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Supreme Court of the United States

October Term, 1997

ANITA DAVIS, REV. LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, and KIM T. LYLES,

Petitioners,

v.

LAWTON CHILES, SANDRA MORTHAM, and DAVID RANCORT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

1. Whether a state's interest in avoiding any alteration of its at-large method of electing trial judges automatically, and in every case, precludes a finding of liability under Section 2 of the Voting Rights Act, without regard to the findings of both the district court and court of appeals that the current election system denies minority voters an opportunity to elect candidates of choice to office because of severe racial bloc voting?

2. Whether the 11th Circuit's holding that "[I]n this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections" conflicts with this Court's 1991 holding that Section Two of the Voting Rights Act applies to at-large judicial elections in *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), as the 11th Circuit's decision denying relief in this case recognized?

3. What are the appropriate standards for evaluating a Section 2 vote dilution challenge to at-large elections for state trial judges?

PARTIES

The parties listed in the caption are the same as the parties in the court below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

A. Summary of Proceedings Below 1

B. Statement of Facts 3

1. History of Racial Discrimination and Racially Polarized Voting 3

2. State Interests and Potential Remedies 5

C. The District Court's and Court of Appeals' Decisions 8

REASONS FOR GRANTING THE WRIT 11

I. THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASS'N V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991) 11

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT'S HOLDING THAT STATE INTERESTS WILL NOT ALWAYS DEFEAT SECTION 2 LIABILITY 22

III. THIS CASE RAISES UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO AT-LARGE ELECTIONS FOR STATE TRIAL JUDGES 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941 (1996) ... 16, 17

Carrington v. Rash, 380 U.S. 89 (1965) 15, 16

Chisom v. Roemer, 501 U.S. 380 (1991) ..... *passim*

Clark v. Roemer, 725 F. Supp. 285 (M.D. La. 1988) 24

Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991) 24

Cousin v. McWherter, 46 F.3d 568 (6th Cir. 1995) 23

Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998) 23

Dunn v. Blumstein, 405 U.S. 330 (1972) 15, 16

Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 501 U.S. 419 (1991) ..... *passim*

In re Certification of Judgeships, 611 So. 2d 1244 (Fla. 1993) 7, 21

League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994) 22, 23

Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987) 24

Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) 24

McDaniel v. Sanchez, 452 U.S. 130 (1981) 15

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995) ..... *passim*

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Roman v. Sincock, 377 U.S. 695 (1964) 15

Shaw v. Reno, 509 U.S. 630 (1993) 10

TABLE OF AUTHORITIES – Continued

Page

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 17

Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1045 (1996) 8, 10

Thornburg v. Gingles, 478 U.S. 30 (1986) 4, 5, 16, 24

White v. Alabama, 74 F.3d 1058 (11th Cir. 1996) 10

Whitcomb v. Chavis, 403 U.S. 124 (1971) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 10

Fla. Const. art. V, § 2(b) 20, 25

Fla. Const. art. V, § 5 13

Fla. Const. art. V, § 6 13

Fla. Const. art. V, § 10 6

Fla. Const. art. V, § 10(b) 13

Fla. Const. art. V, § 11(b) 13

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. §§ 1343(3), (4) 2

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 1

42 U.S.C. § 1973j(f) 2

Fla. Stat. Ann. § 43.022 (West Supp. 1995) 13

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIAL

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)...16, 17

OTHER AUTHORITIES

M. Hough, *The American Bench*, 4th ed. (1987-88) 13

Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 Yale L. & Policy Rev. 354 (1991) 19

OPINIONS BELOW

The April 30, 1998, opinion of the Eleventh Circuit is reported at 139 F.3d 1414 (11th Cir. 1998), and is reproduced at Appendix ("App.") 1a. The July 21, 1996 opinion of the United States District Court for the Northern District of Florida is unreported and is reproduced at App. 29a. The September 3, 1992, opinion of the District Court is unreported and is reproduced at App. 103a.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion and judgment on April 30, 1998, App. 1a, 151a, and denied the defendants' timely Petition for Rehearing on June 26, 1998. App. 149a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the application of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, which is reproduced at App. 153a.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

The petitioners are black citizens and registered voters in Leon County, Florida, and in Florida's Second Judicial Circuit. They filed suit in 1990 challenging the use of at-large election districts with numbered posts and

a majority-vote requirement to elect the 11 judges of the Second Judicial Circuit and the four judges of the Leon County Court, alleging a violation of Section 2 of the Voting Rights Act of 1965. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), and 42 U.S.C. § 1973j(f).

The District Court ruled in favor of plaintiffs' Section 2 claim in 1992, holding that the evidence at trial demonstrated severe racial bloc voting that deprived black voters of an equal opportunity to elect candidates of choice to office. App. 103a-148a. Following the Eleventh Circuit's *en banc* decision in a different case, *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995), however, the District Court reversed its ruling, holding that no permissible remedy for the vote dilution could be imposed consistent with the *Nipper* decision. App. 29a-102a.

Plaintiffs appealed. The Court of Appeals agreed with the District Court's findings of legally significant racially polarized voting, observing that "black candidates [have] little hope of achieving judicial office", App.18a, and that "black voters lack the ability to play even a 'swing' role within the two election districts, whatever the race of the candidates." App. 5a. The Court nevertheless held that controlling Eleventh Circuit precedent had "disallowed" every conceivable remedy for vote dilution caused by an at-large judicial election scheme and that "[I]n this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections." App. 21a. The Court of Appeals therefore affirmed the District Court's judgment for defendants, while recognizing that its ruling "appears to conflict" with this Court's decisions in

Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419 (1991) (holding that Section 2 applies to election of trial judges), and *Chisom v. Roemer*, 501 U.S. 380 (1991) (holding that Section 2 applies to election of appellate judges).

B. Statement of Facts

1. History of Racial Discrimination and Racially Polarized Voting

The Second Judicial District, located in North Florida, is composed of Franklin, Gadsden, Jefferson, Leon, Liberty and Wakulla counties, and has a black population of 28.9%. Leon County has a black population of 24.2%.

Voting in the challenged at-large election districts is highly racially polarized, preventing black voters from electing candidates of their choice to office. Prior to the District Court's original 1992 ruling in this case, which held that the at-large election system unlawfully diluted black voting strength, no black candidate had ever been elected or appointed to the Second Judicial Circuit or the Leon County Court. As the Eleventh Circuit summarized:

> racial block voting has become "a well-known political reality" in elections between black and white candidates for the Second Circuit and Leon County Courts.

App. 4a-5a (quoting District Court decision) (footnotes omitted).[1]

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[1] In all, black candidates ran in contested elections for the Second Judicial Circuit or for county courts within the Circuit a

The lack of black electoral success cannot be explained away in terms of non-racial factors such as incumbency. Black candidates running for open seats, as well as those running against white incumbents, "have faced similar overwhelming opposition from white voters." App. 4a n.4. Even in elections in which no black candidate is running, but black voters unite behind one of the white candidates, black voters have been unable to play a "swing" role to elect a white candidate of their choice. App. 5a. As the District Court and Court of Appeals both noted, the evidence of racially polarized voting in these judicial districts is stronger than that in the districts where a Section 2 violation was found in *Thornburg v. Gingles*, 478 U.S. 30 (1986), this Court's seminal decision setting forth the standards for proving a claim under Section 2. App. 8a n.12; App. 124a.

Further, "the record concerning appointments [to judicial vacancies] confirms the lack of equal political opportunity which results from the current selection system." App. 5a-6a; App. 48a. As the 11th Circuit noted, the first appointment of a black judge to the Second Judicial Circuit came in 1993, and that was in response to the current litigation. App. 9a n.13.

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total of five times from 1980 through 1994, and were defeated each time. App. 38a-39a. During that same time period, out of dozens of elections in which black candidates ran for other offices (*e.g.*, county commission, school board, sheriff), only one black candidate won office against a white candidate in countywide voting. Pl. Ex. 20, Tables 5 & 6 (Report of Dr. Allan J. Lichtman).

The serious vote dilution caused by at-large elections in these two judicial districts continues an historical pattern of racial discrimination in the electoral system and other walks of life in the state. As the District Court found:

> Florida has a history of racial discrimination with respect to the franchise. Defendants concede that this history of racial discrimination has had the effect and purpose in the past of inhibiting the rights of blacks to register to vote and participate in the democratic process, and has had the effect and purpose of reducing black voter participation. [App. 124a]

2. State Interests and Potential Remedies

To demonstrate that black voters would be able to elect candidates of choice in the absence of the challenged at-large electoral configuration, *see Thornburg v. Gingles*, 478 U.S. at 50-51 and n.17, the plaintiffs presented evidence – and the Court of Appeals found – that the black population is sufficiently large and geographically compact to form a majority in one or more compact subdistricts that could elect several of the 11 seats on the Second Judicial Circuit, and in one subdistrict that could be used for the election of one seat on the Leon County Court. The potential subdistricts that plaintiffs identified are not predominantly based on race and would comply with all traditional redistricting criteria. App. 22a-28a.

Subdistrict elections, although a standard remedy in vote dilution cases, are not the only remedial option. In their complaint, the plaintiffs did not confine themselves

to seeking only one particular remedy such as subdistricts, but instead broadly requested relief that would redress the dilution caused by the existing electoral system. Complaint, ¶ 27(c) (R.1). At the second trial of this action, held for the specific purpose of examining potential remedies, plaintiffs presented detailed evidence of alternative remedial proposals. Some of these remedies would provide for subdistricts; some would provide for a combination of subdistrict nominating elections with at-large approval votes that would maintain a form of "linkage" between a judge's jurisdiction and electoral base; and some would provide for cumulative or limited voting systems that maintain at-large elections but alter other features of the election system to overcome minority vote dilution. Pl. Ex. 22, ¶¶ 16-30 (Report of Dr. Richard Engstrom).

The defendants relied on Florida's state interests in maintaining at-large judicial elections as a complete defense to plaintiffs' Section 2 claim. Primarily, they asserted that Florida's interest in maintaining "linkage" between a judge's jurisdiction and electoral base precludes the use of subdistricts as a matter of law. The evidence of Florida's "linkage" interest consists of the fact that Florida's constitution provides for circuit and county judges to be elected "by a vote of the qualified electors within the territorial jurisdiction of their respective courts." Fla. Const. art. V § 10.[2]

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[2] Florida instituted its system of popular elections for circuit (trial) judges in 1942, replacing the prior system of gubernatorial appointment following nomination in party primaries. The state has selected county judges by popular

Other evidence, however, indicated that Florida's important state interests would be served, rather than hindered, by providing a remedy for unlawful vote dilution caused by the existing at-large system. At trial, the state defendants stipulated that states "have a strong interest in eliminating vote dilution and the past exclusion of minorities from elected office, wherever found." Supplemental Pretrial Stipulations at ¶ 13 (R.260). A study commission appointed by the Florida Supreme Court found in 1991 that underrepresentation of minorities in the Florida judiciary "serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color. . . . [and] weakens the very system of ordered liberty upon which our democracy is based." Pl. Ex. 23 at vii-viii. Undisputed evidence also established that the use of subdistricts to overcome minority vote dilution in other states such as Mississippi, far from harming the administration of justice in any way, has improved the administration of justice because of the enhanced perception of fairness stemming from a racially integrated judiciary. Pl. Ex. 24 (testimony of Honorable Robert Gibbs and A. Spencer Gilbert, III). The record further showed that Florida has not consistently enforced the so-called "linkage" between a judge's jurisdiction and his or her electoral base. *See In re Certification of Judgeships*, 611 So. 2d 1244, 1247 (Fla. 1993) (explaining Florida's system of assigning county judges, elected only by voters of a single county, to sit for temporary assignments as circuit

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election continuously since 1966. Elections have been nonpartisan since 1972. Def. Ex. 6 at 59-60, 70-72.

judges); Pl. Ex. 16 (Second Judicial Circuit administrative order providing for assignment of county judges to preside over circuit court cases).

C. The District Court's and Court of Appeals' Decisions

As noted above, the District Court ruled in 1992 that at-large elections for the Second Judicial Circuit and Leon County Court violated Section 2 of the Voting Rights Act by denying African American voters an equal opportunity to participate in the political process and elect candidates of their choice to office. App. 103a. The District Court later vacated this ruling and entered judgment for defendants in 1996, App. 29a, holding that plaintiffs had not demonstrated the existence of a permissible remedy for this vote dilution as required by the 11th Circuit's *en banc* decision in *Nipper v. Smith*. *See also Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1045 (1996) ("SCLC") (rejecting Section 2 challenge to at-large judicial elections in Alabama).[3]

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[3] After the *Nipper* and *SCLC* decisions, the District Court conducted a hearing to receive evidence on potential remedies as well as evidence concerning voting patterns in elections occurring after the court's 1992 decision. Plaintiffs presented detailed expert and lay testimony on both the remedy and polarization issues at this hearing. The defendants presented no expert testimony concerning remedial issues, confining their proof primarily to the issue of whether voting was still racially polarized. The District Court reaffirmed its findings of legally significant racially polarized voting, App. 33a-47a, but nevertheless held that a finding of liability was barred because

On appeal, the Eleventh Circuit agreed that plaintiffs "[have] presented persuasive evidence of racially polarized voting in elections for judgeships on the Second Judicial Circuit and Leon County Courts." App. 28a. The Court nevertheless held that, under the Eleventh Circuit's *en banc* precedents, a plaintiff challenging racially discriminatory at-large judicial elections must demonstrate, as part of the plaintiff's *prima facie* case, a "viable and proper remedy." App. 19a. This remedy must be found " *'within the confines of the state's judicial model'* ", App. 13a (emphasis original), quoting *Nipper v. Smith*, 39 F.3d at 1547 (plurality opinion); *see id.* at 1547 (Edmondson, J., concurring). Because Florida law currently does not provide for any judicial election system other than at-large elections for trial court judges, and because *Nipper v. Smith* barred possible remedies such as cumulative voting that would maintain at-large judicial elections while curing the dilutive impact of the existing system, the Court of Appeals ruled that plaintiffs could not meet the Eleventh Circuit's test for Section 2 liability in judicial election cases. 10a-22a.

In reaching this conclusion, the Court of Appeals acknowledged that plaintiffs' proposed remedies would not "inject race into Florida's judicial administration". App. 28a; *see* App. 17a-19a. The Court also ruled that the illustrative remedial subdistricts presented by plaintiffs complied with all traditional districting principles, were not predominantly based on race, and thus fully satisfied

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all potential remedies would require some alteration in the existing election system and were thus inconsistent with Florida's "judicial model." App. 78a.

the Fourteenth Amendment principles set forth in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. App. 22a-28a.

In ruling against plaintiffs' Section 2 claim despite all these findings, the Court of Appeals stated that it was "troubled by the analysis and the conclusion that our precedents appear to require in cases such as the one at bar." App. 20a. As the Court explained:

> [O]ur circuit in *Nipper* and *SCLC* has placed what now seems, in hindsight, to be an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdiction and electoral base. Together with *Nipper* and *SCLC*, and the additional case of *White v. Alabama*, [74 F.3d 1058 (11th Cir. 1996)] we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections. . . . Thus, in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections. We recognize that this doctrinal development appears to conflict with the Supreme Court's initial pronouncements on this subject in *Chisom* and *Houston Lawyers'*. This panel must, however, adhere to the reasoning of the *en banc* decisions of this court in *Nipper* and *SCLC* until either our circuit decides to revisit this issue *en banc* or we receive further guidance

from the Supreme Court. [App. 20a-22a (citations omitted)].[4]

On June 26, 1998, the Court of Appeals denied the State Defendants' Petition for Rehearing.[5]

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S HOLDING IN *HOUSTON LAWYERS' ASS'N V. ATTORNEY GEN. OF TEXAS*, 501 U.S. 419 (1991).

In *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, this Court held that the "results" test of Section 2 of the

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[4] Senior Circuit Judge Fay concurred in Parts I and IIA, 1-4, of the court's opinion, but did not join in most of Part IIB, which held that the District Court had erred in finding that plaintiffs' illustrative subdistricts would violate the Fourteenth Amendment by intentionally creating majority-black subdistricts. App. 28a. Judge Fay termed the latter holding "unnecessary and therefore dicta with which I disagree but find no need to discuss." *Id.* By joining Part IIA, 1-4, of the opinion, however, Judge Fay did agree (among other things) that the District Court had erred in concluding that plaintiffs' remedies would harm the appearance of justice by injecting race into the administration of justice (Part II.A.3) and that the rejection of all potential remedies in the 11th Circuit was a "troubl[ing]" development in apparent conflict with this Court's decisions in *Chisom* and *Houston Lawyers'* (Part II.A.4).

[5] The defendants' petition for rehearing had asked the Court to delete a footnote in its opinion and to take judicial notice of a recent appointment to the Leon County Court. Because the 11th Circuit has twice in recent years issued *en banc* opinions that reject any possible remedy for vote dilution in judicial elections, plaintiffs did not seek rehearing *en banc*.

Voting Rights Act, prohibiting election schemes that deny minority voters an equal opportunity to participate in the political process and elect candidates of their choice to office, applies to elections for state trial judges. *Id.* at 428. The Court expressly rejected the State of Texas' argument that its interest in maintaining "linkage" between a judge's jurisdiction and electoral base precluded a finding that at-large elections violate Section 2. As this Court stated:

> Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the "totality of circumstances," that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

See also Chisom v. Roemer, 501 U.S. 380 (1991) (holding that Section 2's results test applies to election of appellate judges).

As the decision below acknowledges, App. 20a-22a, the Eleventh Circuit's holding in this case is in clear conflict with *Houston Lawyers'*. Regardless of the severity of racial discrimination that may exist in at-large judicial elections, that discrimination is beyond the reach of Section 2 of the Voting Rights Act if the minority citizens who challenge that discrimination reside in the Eleventh Circuit. Under the Eleventh Circuit's holding that all potential remedies for vote dilution are barred as departing from the state's "judicial model", it does not matter that "racial block voting has become 'a well-known political reality' in elections between black and white candidates for the Second Circuit and Leon County Courts", App. 4a-5a; that "black candidates [have] little hope of

achieving judicial office", App. 18a; that "black voters lack the ability to play even a 'swing' role within the two election districts, whatever the race of the candidates", App. 5a; or that "black voters cannot rely on the appointment process to offset the effects of racially polarized voting", App. 5a-6a. Placing such serious racial discrimination in the electoral process beyond the remedial reach of the Voting Rights Act is directly contrary to this Court's teaching in *Houston Lawyers'* that "[i]f a State decides to elect its trial judges, as Texas did in 1861, those elections must be conducted in compliance with the Voting Rights Act". 501 U.S. at 426.

The Eleventh Circuit's ruling removes the protections of Section 2 of the Voting Rights Act from minority voters in each of 20 at-large circuits used to elect circuit judges in Florida and 67 counties that elect county judges, *see* Fla. Const. art. V, §§ 5, 6, 10(b), 11(b); Fla. Stat. Ann. § 43.022 (West Supp. 1995), as well as in Alabama and Georgia, which also employ elections for judges. Moreover, some 38 additional states use popular elections to elect all or a portion of their judiciaries. *See The American Bench* (M. Hough 4th ed. 1987-1988). If the Eleventh Circuit's ruling forbidding any relief for racially discriminatory judicial election schemes were adopted generally, then the election schemes used to elect judges in the majority of states would be entirely insulated from review under Section 2, contrary to this Court's teachings in *Houston Lawyers'* and *Chisom*. Indeed, the prevalence of popular elections for state judges was an important factor warranting the exercise of this Court's jurisdiction to address whether Section 2 of the Voting Rights Act applies to the election of state-court judges in *Houston*

Lawyers' and *Chisom*. The Eleventh Circuit's withdrawal of Section 2's protections with respect to state-court elections seriously undermines the Act's safeguards against racial discrimination and similarly warrants review by this Court.[6]

Both in principle and in practice, the Eleventh Circuit's doctrine precluding all remedies for vote dilution unless such remedies already exist within the state's "judicial model" is no different from a ruling that judicial elections are exempt from Section 2's results test. A state's "judicial model," as that term is employed by the Eleventh Circuit, is simply the state's existing judicial election system as set forth in the state's constitution or statutes. *See* App. 11a-14a (describing existing features of Florida's "judicial model" reflected in state constitution and statutes); *Nipper v. Smith*, 39 F.3d at 1498-1501 (same) (plurality opinion). Because all possible remedies for a racially dilutive at-large election system, by definition, require some change in at least some of the features of that system, all possible remedies are barred as a matter of law under a rule prohibiting any departure from the existing "judicial model." The court below was thus entirely accurate in pointing out that "in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections." App. 21a.

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[6] The United States has noted that the Eleventh Circuit's doctrine also significantly affects the Attorney General's enforcement of Sections 2 and 5 of the Voting Rights Act. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Nipper v. Smith*, No. 94-1463.

The Eleventh Circuit's ruling misapprehends the role of state interests under Section 2. This Court's precedents protect legitimate state interests by requiring that the state be afforded the first option of crafting and proposing a remedy for any voting rights violation caused by the state's electoral practices. *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981). A state has great flexibility in crafting such a remedy, so long as it cures the violation. *Id.* While a remedial plan should not "intrude upon state policy any more than *necessary*," *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) (emphasis added), this Court has long recognized that state electoral practices – even those of long standing or embodied in state constitutions – may be altered if they violate citizens' federally secured rights:

> Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements.

Reynolds v. Sims, 377 U.S. 533, 584 (1964); *see Roman v. Sincock*, 377 U.S. 695 (1964) (invalidating apportionment of state legislature established by state constitution).[7]

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[7] *Cf. Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating Tennessee constitutional provision setting durational residency requirements for voting); *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating provision of Texas constitution preventing armed services members from voting in local elections). Fashioning

This same remedial framework, permitting deference to state policies to the extent possible but requiring such policies to yield when they directly result in proven vote dilution, is applicable in cases under the Voting Rights Act:

> [e]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 29 n.117.[8] *See Bush v. Vera*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1969 (1996) (O'Connor, J., concurring) ("The Supremacy Clause obliges the States to comply with all constitutional exercises of Congress' power").

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relief in a Section 2 challenge to a judicial election scheme is far less intrusive than the relief provided in cases such as *Dunn* and *Carrington*, which entailed wholesale invalidation of state constitutional provisions on a statewide basis. By contrast, a Section 2 challenge such as this addresses vote dilution only in a specific circuit or county in which it can be proved that minority voters have been excluded from equal political participation by operation of the at-large scheme. In areas of the state where no such pattern of exclusion can be demonstrated, the state's use of at-large judicial elections is unaffected. The localized showing of vote dilution required under Section 2, *see Thornburg v. Gingles*, 478 U.S. at 59-60 n.28; *id.* at 79, thus offers its own significant protection to state policy interests.

[8] *See also id.* at 31 ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice").

By giving preclusive weight to state interests in all Section 2 challenges to judicial election schemes, the Eleventh Circuit's ruling improperly disregards the strong national interest, expressed in the Voting Rights Act, in eliminating racial discrimination in the electoral process. As this Court has observed, the "results" test of Section 2 "is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting." *Bush v. Vera*, 517 U.S. at ___, 116 S. Ct. at 1969 (O'Connor, J., concurring) (quoting S. Rep. No. 97-417 at 4 (1982)); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966) (Congress enacted Voting Rights Act in 1965 to "rid the country of racial discrimination in voting"). When an at-large electoral scheme denies the members of a minority group any meaningful opportunity to elect candidates of choice or even to influence the election of candidates, as the findings of both courts below firmly demonstrate here, some remedy for that racial exclusion is required to effectuate the principles of political equality guaranteed by the Voting Rights Act.

Not only is the elimination of racially discriminatory electoral practices a matter of weighty national interest, it is also an interest shared by the State of Florida itself. As the defendants stipulated below, states "have a strong interest in eliminating vote dilution and the past exclusion of minorities from elected office, *wherever found*." Supp. Pretrial Stip. at ¶ 13 (emphasis added) (R. 260). *See also* Report of Florida Supreme Court Racial and Ethnic Bias Study Commission, Pl. Ex. 23 at vii-viii (concluding

that underrepresentation of minorities in Florida judiciary is detrimental to state's interests). Thus, the Eleventh Circuit's rule rejecting the possibility of a viable Section 2 challenge to a judicial election scheme perversely denies any weight to the state's own interest in eliminating racial discrimination from its electoral practices.

The Eleventh Circuit's application of its "judicial model" test to the facts of this case illustrates how that test entirely exempts judicial elections from the coverage of Section 2. The primary state interest identified by the court below and by the *en banc* opinion in *Nipper* is the state interest in maintaining "linkage" between a trial judge's jurisdiction and electoral base. App. 15a; *Nipper*, 39 F.3d at 1541-1545. The court below described this interest as follows:

> Territorial linkage between a trial judge's jurisdiction and electoral base serves Florida's interest in judicial accountability. . . . Were a judge to be answerable to an electorate smaller than his jurisdiction, the judge would have an incentive, however unethical, to engage in "home cooking," favoring litigants from his election district over others.

App. 15a (citations omitted). Based on this view of the linkage interest, the court below observed, "our circuit has thus effectively ruled out the division of at-large judicial districts into separate subdistricts as a permissible remedy." *Id.* n.16.

This linkage interest, however, is no different from the interest that Texas relied upon in arguing that judicial elections are exempt from scrutiny under Section 2 of the Voting Rights Act. *Houston Lawyers'*, 501 U.S. at 424-425.

All states that use at-large judicial elections have this type of generalized interest in maintaining "linkage." If that alone is sufficient to remove a state's judicial elections from the reach of Section 2, without regard to the severity of the vote dilution caused by the at-large system, then this Court's decision in *Houston Lawyers'* would be meaningless.

But even assuming, for the moment, that the most common remedy for minority vote dilution could properly be "ruled out" as a matter of law in all Section 2 challenges to judicial election schemes, plaintiffs presented detailed and undisputed evidence demonstrating the availability of other remedies that would preserve "linkage" and thus accommodate the state's asserted interest. These alternatives include modified at-large election systems such as cumulative or limited voting, which would not require any alteration in the current "linkage" between jurisdiction and electoral base.[9] The court below, however, declined even to discuss the possibility of employing cumulative or limited voting remedies to address the serious vote dilution proven in this case, solely because the Eleventh Circuit's previous *en banc* rulings had "disallowed" such remedies. App. 21a (citing

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[9] These remedies retain at-large, jurisdiction-wide elections, thus preserving "linkage." They remedy vote dilution by altering other features of the election system, such as the number of votes that may be cast by voters and the number of seats elected in each election. Pl. Ex. 22, ¶¶ 16-30 (Report of Dr. Richard Engstrom); *see generally* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 Yale L. & Policy Rev. 354 (1991).

Nipper); *see id.* 6a n.7. Other alternatives, such as remedies combining subdistrict elections with an at-large approval vote by the entire electorate of the court's jurisdiction,[10] were also summarily rejected because of their departure from complete "linkage." App. 16a-17a. Quite clearly, the Eleventh Circuit's analysis admits of no remedy that departs from *any* of the existing features of the current election system – which is simply to say that it admits of no remedy.

Finally, the court below improperly assumed the importance of the state's "linkage" interest without conducting any analysis of the evidence bearing on that question. Plaintiffs presented undisputed proof that Florida does not consistently enforce the so-called "linkage" between a judge's jurisdiction and his or her electoral base. As the Florida Supreme Court has observed, the temporary assignment of county judges to sit as circuit judges – as permitted by Article V, section 2(b) of the Florida Constitution – is "often necessary and indeed, critical to the effective management of caseloads in many

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[10] Under this alternative, subdistricts would be used to hold an initial "nominating" election for each seat, but the winner of the subdistrict election would have to be approved by a "yes" or "no" vote of all the voters in the circuit or county at-large before taking office. Judges would then serve the usual term (six years for circuit court and four years for county court) before sitting for re-election in the usual manner. Alternatively, subdistricts could be used to elect judges for an initial period of service, with an at-large vote by the entire jurisdiction taking place during the mid-point of the judge's term. Judges approved by the at-large electorate after this initial period of service would then serve the remainder of the regular term before sitting for re-election in the usual manner.

circuits." *In re Certification of Judgeships*, 611 So. 2d 1244, 1247 (Fla. 1993). Within the Second Judicial Circuit in particular, this assignment system has resulted in county judges, elected only by the voters of one county, exercising circuit court jurisdiction over litigants who had no voice in electing that judge. Pl. Ex. 16 (Administrative Order No. 90-08 issued by Chief Judge of Second Judicial Circuit). This common practice of dispensing with "linkage" within the Second Judicial Circuit has not impeded the proper administration of justice in the Circuit. R.270 at 200 (Testimony of Robert Travis). A respected Florida judge with long experience in the state court system, the Hon. Emerson Thompson, also testified that judges in Florida frequently preside over cases involving litigants who do not reside in their electoral districts, that judges consistently act fairly in such cases, and that they would continue to do so under a subdistrict system of elections. R.124, Vol. II at 167-170.

Undisputed evidence also established that the use of subdistricts to overcome minority vote dilution in other states such as Mississippi has not harmed the administration of justice in any way. Witnesses familiar with the operation of these election systems testified that judges generally are not even aware of the litigants' addresses, and that a judge perceived as biased against litigants outside his or her subdistrict would find it difficult to obtain campaign support from the bar, because lawyers continue to practice before all the judges and to play a major role in elections. Pl. Ex. 24 (testimony of Honorable Robert Gibbs and A. Spencer Gilbert, III). The court below discussed none of this evidence in evaluating the strength of the state's "linkage" interest.

Houston Lawyers' instructs that states which choose to elect their judges cannot exempt their election systems from the requirements of Section 2 of the Voting Rights Act. The Eleventh Circuit's ruling that no finding of liability for racially discriminatory at-large judicial elections is ever permissible contravenes this Court's ruling in *Houston Lawyers'* and should be reviewed by this Court.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT'S HOLDING THAT STATE INTERESTS WILL NOT ALWAYS DEFEAT SECTION 2 LIABILITY.

The Eleventh Circuit's holding in this case conflicts with the Fifth Circuit's holding in *League of United Latin American Citizens ("LULAC") v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994). The court below held that a state's interest in retaining existing judicial election districts automatically outweighs, as a matter of law, any and all evidence of racial vote dilution and bars a liability finding under Section 2. In *LULAC*, however, the Fifth Circuit recognized that while the state's interest must be considered, "we recognize that it will not always defeat § 2 liability." As that court noted:

> The State of Texas maintains that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality. The Supreme Court rejected this position when it held that the linkage interest does not "automatically, and in every case, outweigh

> proof of vote dilution." *Houston Lawyers'*, ___U.S. ___, 111 S. Ct. at 2381.

999 F.2d at 870 (emphasis in original). Instead, said the Fifth Circuit, the state's interest "is balanced against localized evidence of racial vote dilution" and "must be weighed in the totality of circumstances." *Id.* at 868. If there is "substantial proof of racial dilution", it outweighs conflicting state interests, according to the Fifth Circuit, and is sufficient to demonstrate a violation of Section 2. *Id.* Although the Fifth Circuit in *LULAC* ultimately held that the plaintiffs in that case had not carried their burden of proving liability under Section 2, it was because the Court concluded that the evidence of dilution was non-existent or weak at best, and not because the state's interests automatically barred any remedy as a matter of law.[11]

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[11] The Sixth Circuit has taken conflicting positions on the applicability of Section 2 to judicial elections. In *Cousin v. McWherter*, 46 F.3d 568, 577 (6th Cir. 1995) (*"Cousin I"*), a challenge to at-large judicial elections in Tennessee, the Sixth Circuit held that "The state's interest is only one factor to be considered in evaluating the totality of circumstances. It does not automatically outweigh proof of racial vote dilution." *Cousin I* remanded the case to the District Court for further findings on both the vote dilution and state interest issues. However, after the District Court found on remand that the at-large election plan diluted minority voting strength in violation of Section 2, and that the proof of vote dilution outweighed the state's interest in avoiding any alteration of its election system, the Sixth Circuit reversed. *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998) (*"Cousin II"*). In *Cousin II*, the Sixth Circuit reversed the findings of legally significant white bloc voting, but also held that the state's interests would have prevented any relief even if vote dilution had been demonstrated. Thus, the Sixth

Here, by contrast, both the District Court and Court of Appeals found that plaintiffs' proof clearly demonstrated legally significant racially polarized voting meeting the standards set forth in *Thornburg v. Gingles*, yet the Eleventh Circuit held that a finding of liability under Section 2 was barred based solely on Florida's interests in avoiding any alteration of its election system. This Court should grant the petition for writ of certiorari to resolve this conflict in the lower courts.

III. THIS CASE RAISES UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE TO AT-LARGE ELECTIONS FOR STATE TRIAL JUDGES.

In its 1991 decisions holding that Section 2 applies to elections for state court judges, this Court expressly reserved the question of "the elements that must be

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Circuit appears to be following the Eleventh Circuit's rulings which bar the possibility of any successful Section 2 challenge to a judicial election scheme.

It also deserves mention that the Eleventh Circuit's decision conflicts with two District Court holdings within the Fifth Circuit finding violations of Section 2 despite the states' invocations of state interests in retaining the existing at-large election districts. *See Clark v. Roemer*, 725 F. Supp. 285 (M.D. La. 1988), 777 F. Supp. 471 (M.D. La. 1991); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987) and *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). In both cases, the federal District Court found liability, and when the state legislatures failed to adopt remedies, the courts implemented remedial subdistrict plans that have been in place now for several years.

proved to establish a violation of the Act" in the context of judicial elections. *Chisom v. Roemer*, 501 U.S. at 390. As the Court stated:

> The standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the "totality of circumstances" described in § 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

501 U.S. at 403 (footnote omitted). Although *Houston Lawyers'* made clear that state interests do not "automatically, and in every case, outweigh proof of racial vote dilution", 501 U.S. at 426-427, this Court has never addressed how state interests should properly be assessed in the context of a showing of actual vote dilution caused by a judicial election system.

Houston Lawyers' also left unresolved the question of whether a state's interest in maintaining at-large election districts for trial court judges is relevant at the liability stage or only at the remedy stage of a Section 2 case:

> [W]e believe [the state's interests] are matters that are relevant *either* to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2, as amended, *or to a consideration of possible remedies* in the event a violation is proved, but not to the threshold question of the Act's coverage. *Even if we assume, arguendo,* that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing

> districts, or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case, that interest does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test.

501 U.S. at 426 (emphasis added).

Resolution of these issues will have important implications for voters in states that elect judges and is critical to the proper administration of Section 2, as witnessed by the conflicting lower court decisions that have addressed Section 2 challenges to judicial election districts since *Chisom* and *Houston Lawyers'*. *See* cases cited in Part II, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Opinion of the Eleventh Circuit 1a

Opinion of the U.S. District Court, 1996 ..... 29a

Opinion of the U.S. District Court, 1992 ..... 103a

Order of the Eleventh Circuit denying petition for rehearing 149a

Judgment of the Eleventh Circuit 151a

Voting Rights Act, Section 2 ..... 153a

PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-3547

D. C. Docket No. 90-CV-40098-MMP

ANITA DAVIS, LEE E. HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, KIM T. LYLES,

Plaintiffs-Appellants,

versus

LAWTON CHILES; SANDRA MORTHAM, FLORIDA SECRETARY OF STATE; DAVID RANCOURT, DIRECTOR, DIVISION OF ELECTIONS, FLORIDA DEPARTMENT OF STATE,

Defendants-Appellees,

JIM SMITH, DOT JOYCE,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida

(April 30, 1998)

Before BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL*, Senior District Judge.

---

* Honorable Maurice B. Cohill, Senior District Judge for the Western District of Pennsylvania, sitting by designation.

BIRCH, Circuit Judge:

In this case we review plaintiff-appellants' challenge to two at-large judicial election districts in Florida under Section Two of the Voting Rights Act, 42 U.S.C. § 1973 ("Section Two"). Although the district court found that racially polarized voting plagued the electoral systems at issue, it granted judgment to the defendant-appellees on the ground that Florida's interest in maintaining its current system of selecting judges outweighs the plaintiff-appellants' interest in their proposed remedy. In addition, the district court ruled that it could not accept plaintiff-appellants' remedial plan because it would involve racially-conscious redistricting without a compelling state purpose. Because we believe that our Section Two precedents foreclose any significant restructuring of a state's judicial election system, we affirm.

I. BACKGROUND

In this class action, plaintiff-appellants Anita Davis, et al. ("Davis") attack two at-large judicial election systems in Florida on the grounds that black voters within these systems suffer from illegal vote dilution. Although the two districts at issue differ in size and jurisdiction, they share similar electoral systems and demographics. First, the Second Judicial Circuit ("Second Circuit") comprises the six counties of Franklin, Gadsen, Jefferson, Leon, Liberty, and Wakulla. All eleven judges on the Second Circuit are elected in at-large, circuit-wide voting for six-year terms. Within the Second Circuit, blacks constitute 28.9% of the overall population, 26.1% of the voting age population, and 25.1% of registered voters. Much

like the judges on the Second Circuit, the four judges on the Leon County Court are elected in at-large, county-wide voting for four-year terms. In Leon County, blacks make up 24.2% of the overall population, 22.2% of the voting age population, and 21.8% of registered voters. In both election districts, the black population is concentrated in a few areas, with many black voters residing either within Gadsen County or a few precincts of Tallahassee. Further, the non-partisan election systems in both the Second Circuit and Leon County include majority vote requirements, post-numbered systems,[1] and staggered terms. In both circuits, the Governor may fill any mid-term vacancies through appointment of candidates recommended by a Judicial Nominating Commission. Finally, the Second Circuit Court is a trial court of general jurisdiction, *see* Fla. Const. art. V § 6; Fla. Stat. § 26.012, while the Leon County Court is a trial court of limited jurisdiction, *see* Fla. Const. art. V § 5; Fla. Stat. § 34.01.

Beyond these structural similarities, the two judicial districts also share a history of racially polarized voting. In the few elections in which black candidates have competed against white candidates (prior to Davis's initiation of this litigation), no black lawyer has ever won election to either the Second Circuit or Leon County Courts.[2] In

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[1] In a post-numbered multi-member district, each candidate runs for a specific (numbered) "post". This way, incumbents do not have to run against each other, and more focused competition may develop between a limited number of candidates running for particular posts.

[2] Following the district court's initial finding of racially polarized voting in elections for the Second Circuit and Leon County Courts, the Florida legislature specially created a new

each of these black-versus-white elections, the overwhelming majority of black voters supported the black candidates.[3] Notwithstanding this political cohesion among black voters, however, white voters did not supply enough crossover votes for the black candidates to prevail, but instead provided overwhelming support to the white candidates.[4] In 1992, for example, black voters in Leon County gave approximately 98% of their support to a black candidate, but a white candidate who received 68% of the white vote still won the election. As a result of this dynamic, racial block voting has become "a well-

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judgeship on the Second Circuit, to which the Governor appointed a black lawyer. *See infra* note 6. This single black judge has since won reelection, having run without opposition. In addition, a black lawyer recently defeated a white candidate for a judgeship in Leon County. Elections of minority candidates during the pendency of Section Two litigation, however, have little probative value. *See Thornburg v. Gingles*, 478 U.S. 30, 76, 106 S. Ct. 2752, 2779, 92 L. Ed. 2d 25 (1986) ("[T]he court could properly notice the fact that black electoral success increased markedly . . . after the instant lawsuit had been filed – and could properly consider to what extent 'the pendency of this very litigation [might have] worked a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting.' ") (alteration in original).

[3] As the district court observed, the record of exogenous black-versus-white elections reinforces this conclusion regarding the effect of racially polarized voting on blacks' electoral success in these districts.

[4] We also note that black candidates' lack of electoral success is not simply the result of incumbency effects. Whether running for white-held or open seats, black candidates have faced similar overwhelming opposition from white voters (prior to the initiation of this litigation).

known political reality" in elections between black and white candidates for the Second Circuit and Leon County Courts. R5-146 at 18.

This description of the voting patterns in the Second Circuit and Leon County receives further support from a review of "split-preference" elections, in which black and white voters have preferred different white candidates.[5] In the eleven split-preference elections in the record involving either the Second Circuit or Leon County Courts, black voters have never succeeded in electing their first choice candidate. In nine of the split-preference elections, the black-preferred candidate lost outright to the white-preferred candidate. In the tenth split-preference election, the black-preferred candidate won a primary election over the white-preferred candidate, but the black-preferred candidate then lost the general election to a white-preferred candidate. In the eleventh case, black voters' first choice was a black candidate who lost to a white candidate in the primary election; only after this defeat did a majority of black voters settle on the white candidate who ultimately defeated the white-preferred candidate in the general election. Thus, black voters lack the ability to play even a "swing" role within the two election districts, whatever the race of the candidates.

At the same time, black voters cannot rely on the appointment process to offset the effects of racially

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[5] Although evidence drawn from elections involving black candidates is more probative in Section Two cases, an analysis of split-preference elections is also appropriate and relevant. *See Nipper v. Smith*, 39 F.2d [sic] 1494, 1539-41 (11th Cir. 1994) (*en banc*) (plurality opinion).

polarized voting. Prior to 1992, when the district court first ruled that racial polarization existed in the districts at issue, no black person had ever received an appointment to either the Second Circuit or the Leon County Court.[6] Moreover, while the appointment process has been a significant route to the bench in Leon County, election rather than appointment has been the primary path to judicial office for the Second Circuit.

On June 5, 1990, Davis brought a Section Two suit in the district court against defendant-appellees Chiles, *et al.* ("Chiles") to challenge the legality of the at-large election systems for the Second Circuit and Leon County Courts. Specifically, Davis alleged that illegal vote dilution tainted elections for judgeships on the two courts. As her proposed remedy, Davis asked the court to impose a modified subdistricting plan.[7] Under this proposed

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[6] Following the district court's initial finding of racial polarization but before the district court considered Davis's proposed remedy, the Florida legislature added a seat to the Second Circuit (overriding the Supreme Court of Florida), to which the Governor appointed a black lawyer. This single appointment, however, does not dispel our view that the appointment process has not proven a significant remedy for racially polarized voting in the Second Circuit. *See Gingles*, 478 U.S. at 76, 106 S. Ct. at 2779. Moreover, the Governor has not appointed any black judges for the Leon County Court.

[7] In addition to her modified subdistricting scheme, Davis also proposed cumulative and limited voting systems as alternative potential remedies. Because this court has already rejected the elimination of Florida's place-numbering system (as would be required for Davis's cumulative and limited voting plans), we decline to discuss these proposed remedies further here. *See Nipper*, 39 F.3d at 1545-46 (plurality opinion) (warning that elimination of place-numbering would force incumbent

system, the two current at-large districts would be split into a combination of single- and multi-member subdistricts. In each of the new, smaller districts, voters would choose individual judges in competitive, post-numbered elections.[8] Then, each successful subdistrict candidate would face a circuit- or county-wide retention vote by all of the citizens over whom they would exercise jurisdiction.[9] Should any candidate chosen by a subdistrict fail to receive majority support in a retention vote, the Governor would have the power to fill the empty judgeship as he would any mid-term vacancy.

After conducting a bench trial, the district court ruled on September 3, 1992, that the judicial election systems in both the Second Circuit and Leon County violated Section Two.[10] Specifically, the district court held

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judges to run against each other, thereby destroying collegiality), 1547 (Edmondson, J., concurring); *see also League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 876 (5th Cir. 1993) (*en banc*) (rejecting cumulative and limited voting).

[8] As part of her subdistricting proposal, Davis has offered several potential subdistrict designs. Because Davis's specific subdistricting plans all raise the same general legal issues, we, like the parties, shall discuss them together as if they represented a single remedial scheme.

[9] Under Davis's proposal, Florida would determine whether it would require judicial candidates to reside within the subdistricts in which they wished to seek election.

[10] In addition to the circumstances described above, the district court found that Florida has had a history of racially discriminatory voting practices and that continuing socio-economic disparities are hindering blacks' participation in the political process in these districts. *See generally Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763 (discussing relevance of these factors for analyses of the totality of the circumstances in Section Two

that Davis had proven each of the three *Gingles* factors that the Supreme Court has held are required to establish a prima facie case of vote dilution regarding a multi-member district: (1) that the black population in the two systems is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that black voters in the two systems are politically cohesive; and (3) that whites in the at-large districts vote sufficiently as a block to enable them usually to defeat the black voters' preferred candidate.[11] *See Gingles*, 478 U.S. at 50-51, 106 S.Ct. at 2766-67.[12]

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cases). The district court, however, also noted that the current electoral systems in these districts was not created for any racially discriminatory purpose and has not been administered in a racially discriminatory manner.

[11] In explaining this third factor, the *Gingles* Court was careful to distinguish "the usual predictability of the majority's success," which indicates a systemic problem, from "the mere loss of an occasional election." *Gingles*, 478 U.S. at 51, 106 S. Ct. at 2767.

[12] In fact, the district court wrote that there is more evidence to support a finding of racially polarized voting in this case than there was in *Gingles*:

> In the districts where violations were found in *Gingles*, the estimates of black support for black candidates ranged as low as 25 to 36 percent in several elections, while white support for black candidates was often over 30 percent. Moreover, black candidates had previously been elected to the office in question in all but one of the districts where a violation was found in *Gingles*.

R5-146 at 17 (citations omitted).

Shortly after its 1992 ruling, however, the district court set aside its judgment and stayed further proceedings during the 1993 session of the Florida legislature in order to allow the state to develop a remedy.[13] Subsequently, the district court extended its stay while it awaited this court's *en banc* decision in *Nipper*. After we delivered our opinions in *Nipper* and also in *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (*en banc*) ("*SCLC*"), the district court conducted further hearings specifically directed at the efficacy and propriety of Davis's proposed remedy. Then, on July 21, 1996, the district court rejected Davis's remedial plan and granted judgment for Chiles. Although the district court noted that its second set of hearings had only reinforced its earlier finding of racially polarized voting, it now held that Davis had not met her prima facie burden of proposing an appropriate remedy under the first *Gingles* factor as our *en banc* court had recently interpreted in *Nipper* and *SCLC*. Specifically, the district court held that Florida's interests in (1) maintaining the judicial model established by its Constitution, (2) preserving the territorial link between its judges' electoral districts and jurisdictions, and (3) preventing the racial stigmatization of its judiciary collectively outweighed Davis's interest in adopting her proposed remedy to ameliorate the effects of racially polarized voting. Then, the

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[13] In addition, Davis and Chiles jointly requested that the district court stay further proceedings until Jan. 1, 1994. As a condition of this joint request, Chiles agreed that the state would ensure the creation of a judgeship on the Second Circuit Court and that he would appoint a black lawyer to that new position.

district court ruled that it could not accept Davis's modified subdistricting plan because her proposal constituted racially-conscious redistricting that was not justified by any compelling interest.

II. DISCUSSION

Davis challenges both the district court's holding that Florida's interest in preserving its judicial election system outweighs her interest in a remedy for racially polarized voting and its ruling that her proposed subdistricting remedy is impermissibly race-conscious. We discuss each issue in turn.

A. THE BALANCE OF INTERESTS REGARDING DAVIS'S PROPOSED REMEDY

As part of any prima facie case under Section Two, a plaintiff must demonstrate the existence of a proper remedy. *See SCLC*, 56 F.3d at 1289, 1294-97; *Nipper*, 39 F.3d at 1530-31 (plurality opinion), 1547 (Edmondson, J., concurring).[14] In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan. *See Houston Lawyers' Ass'n. v. Attorney General of Tex.*, 501 U.S. 419, 426, 111 S. Ct. 2376, 2381,

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[14] Our *en banc* court established this principle as part of our Section Two jurisprudence in our interpretation of the first *Gingles* factor in *Nipper*. *See Nipper*, 39 F.3d at 1530-31 (plurality opinion); *see also Nipper*, 39 F.3d at 1547 (Edmondson, J., concurring).

115 L. Ed. 2d 379 (1991). Although the district court found that black voters in the Second Circuit and Leon County suffered from racially polarized voting, it concluded that Florida's interests, as previously described, in (1) protecting the judicial model established by its Constitution, (2) preserving linkage between its judges' jurisdictions and electoral bases, and (3) avoiding racial stigmatization of its judicial system outweighed Davis's interest in her proposed remedy. As a result, the court held that Davis had not demonstrated the existence of an appropriate remedy and therefore had failed to set forth a Section Two violation under our circuit's jurisprudence. We review the district court's factual findings regarding Davis's proposed remedy for clear error and its analysis of law *de novo*. *See Gingles*, 478 U.S. at 79, 106 S.Ct. at 2780-81; *SCLC*, 56 F.3d at 1291.

1. Interference with Florida's Constitution

The district court detailed in its opinion a number of ways in which Davis's proposed remedy would contravene the Florida Constitution. Although Davis does not now contest any of these constitutional problems under Florida law, we review the ramifications of Davis's proposed remedy to establish the extent to which Davis's plan would affect Florida's interest in maintaining its judicial model.

First, Davis's plan would require changes to Article V, Section 10 of the Florida Constitution, which directs that circuit and county judges be elected "by a vote of the qualified electors within the territorial jurisdiction of their respective courts." Fla. Const. art. V § 10. Under

Florida law, there is a difference between an "election," which allows for competing candidates, and a "retention" vote for judicial office, which does not. *See* Fla. Stat. § 105.011(2) (distinguishing between an "election" and a "retention" in defining a "judicial office"). Although Davis's plan would permit citizens residing outside a subdistrict to vote in retentions, it would deny them the right to take part in the "elections," in contravention of Florida's provision that they can participate in both. *See* Fla. Stat. §§ 105.061, 105.051.

Second, the retention language of Article V, Section 10 includes only justices of the Florida Supreme Court or judges of a district court of appeal, as do Florida's statutes. *See* Fla. Const. art. V § 10(a); Fla. Stat. §§ 105.051(2), 105.061. Accordingly, there is no constitutional or statutory basis in Florida law for the retention system Davis proposes; as the district court observed, Florida's Constitution and statutes would have to change to allow for Davis's proposed move from jurisdiction-wide, competitive elections to competitive, subdistrict elections followed by jurisdiction-wide retentions.

Third, Article V, Section 9 of the Florida Constitution provides that either the Supreme Court of Florida or the Florida legislature shall define the territories of Florida's judicial circuits. *See* Fla. Const. art. V § 9. If a court were to require Florida to accept one of the subdistrict design plans contained in Davis's subdistricting proposal, it would, by necessity, contravene this provision. This last constitutional problem is of lesser import, though, because it goes only to Florida's manner of implementing its judicial model (i.e., how it defines the borders of its circuits) rather than to the nature of Florida's judicial

model itself (which Davis would dramatically change by requiring subdistricting and circuit and county retentions, above).[15]

In *Nipper*, we explained that a state has an interest in maintaining the judicial selection model established by its constitution. *See Nipper*, 39 F.3d at 1531 (plurality opinion), 1547 (Edmondson, J., concurring). In rejecting a plan to replace some of Florida's at-large judicial election districts with single-member subdistricts, a majority of this court joined then-Chief Judge Tjoflat's holding that:

> Implicit in this first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system. Nothing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives. Accordingly, we read the first threshold factor of *Gingles* to require that there must be a remedy *within the confines of the state's judicial model* that does not undermine the administration of justice.

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[15] Davis's subdistricting proposal also runs counter to Florida's steady trend "away from partisan judicial elections and towards the merit selection and resulting independence of the judiciary." *Nipper*, 39 F.3d at 1544 (plurality opinion). By making judicial candidates responsive to smaller (i.e., subdistrict) constituencies, Davis's plan "would, by its very nature, alter this course and encourage greater 'responsiveness' of judges to the special interests of the people who elected them." *Id.*

. . . .

> In judicial cases . . . *single-member districts may run counter to the state's judicial model.*

Id. at 1531 (plurality opinion) (emphasis added); *see id.* at 1547 (Edmondson, J., concurring); *see also Holder v. Hall*, 512 U.S. 874, 880, 114 S. Ct. 2581, 2585, 129 L. Ed. 2d 687 (1994) ("In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.") (quoted in *Nipper*, 39 F.3d at 1531-32 (plurality opinion)). Under *Nipper*, therefore, this court must carefully consider the impact that any remedial proposal would have on the judicial model enshrined in a state's constitution or statutes.

Responding to Chiles' reliance on *Nipper*, Davis contends that any viable remedy for racially polarized voting must necessarily effect some change in established electoral practices. Given both the *Nipper* precedent and the extent of the interference with Florida's judicial model that Davis's proposed remedy would require, however, Davis's argument cannot dispel our duty to give weight to Florida's right to maintain the integrity of its constitutional system. Although we are troubled by the apparent presumption in favor of status-quo polarization *Nipper* suggests, precedent requires that we consider Florida's interest in maintaining its Constitution's judicial selection system in determining whether Davis has proposed a permissible remedy. We therefore weigh this factor against imposition of Davis's modified subdistricting plan.

2. Linkage Between Judges' Jurisdictions and Electoral Bases

Territorial linkage between a trial judge's jurisdiction and electoral base serves Florida's interest in judicial accountability. *See SCLC*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1543-45 (plurality opinion). Were a judge to be answerable to an electorate smaller than his jurisdiction, the judge would have an incentive, however unethical, to engage in "home cooking," favoring litigants from his election district over others. *See SCLC*, 56 F.3d at 1297. Thus, as the Supreme Court has observed, "the State's interest in maintaining . . . the link between a district judge's jurisdiction and the area of residency of his or her voters . . . is a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a § 2 violation has occurred." *Houston*, 501 U.S. at 426, 111 S. Ct. at 2381. When, as in this case, there is no evidence that a state is administering its judicial election system in a racially discriminatory manner, the state's interest in preserving linkage between judges' jurisdictions and electoral bases is even weightier. *See Nipper*, 39 F.3d at 1544 (plurality opinion). Moreover, we have suggested that Florida has an interest in avoiding even the appearance that its judges may harbor "home cooking" biases. *See id.*[16]

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[16] Because of the importance of this linkage interest, our circuit has thus effectively ruled out the division of at-large judicial election districts into separate subdistricts as a permissible remedy. *See Nipper*, 39 F.3d at 1543-45 (plurality opinion), 1547 (concurring opinion); *SCLC*, 56 F.3d at 1296-97.

Well aware of these precedents, Davis argues that her modified subdistricting plan would protect Florida's linkage interests because each judge elected at the subdistrict level would face a retention vote by all of the citizens within his jurisdiction. Although we appreciate Davis's creativity in attempting to surmount the challenges that *Nipper* and *SCLC* pose to her suit, we must conclude that her proposed remedy would substantially break Florida's linkage between its judges' jurisdictions and electoral bases. First, as a practical matter, Davis's proposed retention votes would place no real check on judges on the Second Circuit or Leon County Courts. Based on the history of elections involving incumbents on these two courts, the district court found that "in election systems limiting non-subdistrict voters to a right to vote for or against retention or for jurisdiction-wide approval or disapproval after an initial election, the powerful effect of incumbency in judicial elections would render that right virtually worthless." R8-277 at 43. Since Davis has not challenged the district court's assessment, and we have found no reason in the record to disagree with the district court's factual findings concerning incumbency, we agree with the district court that imposition of Davis's plan "would be akin to compelling the state to disenfranchise every voter residing in the two jurisdictions, but outside the subdistrict."[17] *See id.* at 44. Second, precedent requires

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[17] In fact, there is reason to believe that the retention votes that Davis proposes would be even less meaningful than the record of incumbents in the two districts suggests. Since the retentions would be uncontested, even fewer members of the community would have incentive to bring incumbent judges' records in office to the attention of voters outside the incumbents' particular subdistricts.

us to recognize the risk that judges under Davis's proposal would prove unaccountable to many voters even within their subdistricts because of continued racial block voting:

> [I]n the judge's own subdistrict, voters would be disenfranchised: In white subdistricts the voting power of blacks would be diluted; in black subdistricts the voting power of whites would be diluted. The likely effects of the loss of minority influence would be more pronounced in this context of a lone decisionmaker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction.

SCLC, 56 F.3d at 1297.[18] In sum, Davis's proposed remedy would substantially vitiate Florida's linkage interest, another significant factor that we must weigh against imposing Davis's proposal.

3. The Appearance of Justice

In *Nipper*, a plurality of this court insisted that any remedy for racially polarized voting in judicial elections must not undermine "the administration of justice." *Nipper*, 39 F.3d at 1546 (plurality opinion). "By altering the current electoral schemes for the express purpose of electing more black judges," the plurality wrote, the plaintiffs in *Nipper* risked "proclaiming that race matters in the

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[18] Although we weigh this "subdistrict disenfranchisement" factor as required by *Nipper*, we feel compelled to remark that citizens of the Second Circuit and Leon County would be no more disenfranchised by polarized voting under Davis's plan than they are under the current at-large system.

administration of justice." *Id.* at 1546 (plurality opinion). The plurality thus posed what it saw as a remedial impossibility:

> The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal. In the eyes of the public and litigants, at least, justice would not remain colorblind.

Id. Based on this language in *Nipper*, the district court held that Davis's proposed remedy would improperly inject race into the administration of justice in the Second Circuit and Leon County.

Although we, too, are concerned that racial politics should not appear to taint Florida's judicial system, we agree with Davis that her proposed remedy would be no worse in this regard than a judgment preserving the status quo. Today, voting in judicial elections for the Second Circuit and Leon County Courts is racially polarized, giving black candidates little hope of achieving judicial office. Whether or not we adopt Davis's plan, therefore, race would "matter" within these jurisdictions; Davis's scheme would simply exchange present misgivings about whites' successes in at-large judicial elections for new qualms from those who would view lawyers elected from Davis's new subdistricts as representatives

of racial groups rather than as neutral jurists.[19] Further, we note that a majority of our court chose not to join the *Nipper* plurality's discussion of this issue, so we are not bound by the plurality's concept of a "remedial paradox." In this case, at least, we do not think that fear of injecting race into judicial administration favors either side, so we do not weigh it as an interest for or against Davis's proposed remedy.[20]

4. Weighing the Interests

As we observed above, a plaintiff must propose a viable and proper remedy in order to establish a prima facie case under Section Two. *See SCLC*, 56 F.3d at 1294-97; *Nipper*, 39 F.3d at 1530-31 (plurality opinion), 1547 (Edmondson, J., concurring). Before determining whether Chiles is violating Section Two, therefore, we must consider Florida's interest in maintaining the challenged electoral system. *See Houston Lawyers*, 501 U.S. at

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[19] Indeed, if we were to follow the *Nipper* plurality's analysis, then we would be compelled to rule against all plaintiffs who bring Section Two cases involving judicial elections. Any remedy designed to alleviate racially polarized voting is by definition intended to help minority voters elect their candidates of choice. Under the *Nipper* plurality's reasoning, any remedy would therefore improperly inject race into a state's judicial system.

[20] We also note that, in this case, the state has already chosen to "inject race" into its administration of the Second Circuit Court. After the district court made its initial finding of racially polarized voting, the Florida legislature overruled the Supreme Court of Florida to create an additional seat on the Second Circuit, to which the Governor appointed a black lawyer (as he had promised Davis).

426-27, 111 S. Ct. at 2381; *SCLC*, 56 F.3d at 1294-97; *Nipper*, 39 F.3d at 1330-31 (plurality opinion), 1547 (Edmondson, J., concurring). Of primary importance in this case, our adoption of Davis's plan would require us to contravene Florida's Constitution and to substantially break the link between the affected judges' jurisdictions and electoral bases. In *Nipper* and *SCLC*, we ruled that a state's interest in maintaining its judicial model and in preserving such linkage outweighed the plaintiffs' interest in ameliorating the effects of racial polarization in at-large judicial elections. *See SCLC*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1543-45 (plurality opinion). Based on these precedents, we hold that Davis's modified subdistricting plan would not be a proper remedy for the racial block voting that exists in the Second Circuit and Leon County.

Nonetheless, we are troubled by the analysis and the conclusion that our precedents appear to require in cases such as the one at bar. The Supreme Court has clearly and repeatedly held that Section Two applies to state judicial elections. *See Chisom v. Roemer*, 501 U.S. 380, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991); *Houston Lawyers*, 501 U.S. at 428, 111 S. Ct. at 2381. Moreover, the Court has explicitly stated that

> [b]ecause the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices is merely one factor to be considered in evaluating the 'totality of the circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution.

Houston Lawyers, 501 U.S. at 427, 111 S. Ct. at 2381. In interpreting *Chisom* and *Houston Lawyers*, our circuit in

Nipper and *SCLC* has placed what now seems, in hindsight, to be an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdictions and electoral bases. Together with *Nipper*, *SCLC*, and the additional case of *White v. Alabama*, we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections. *See Nipper*, 39 F.3d at 1542-46 (plurality opinion) (rejecting subdistricting, redistricting, and cumulative voting (and effectively precluding limited voting)), 1547 (Edmondson, J., concurring); *SCLC*, 56 F.3d at 1294-97 (rejecting redistricting and subdistricting); *White v. Alabama*, 74 F.3d 1058, 1072-73 (11th Cir. 1996) (invalidating consent decree adding judgeships to be filled through a special nomination commission). Given such rulings, neither we, nor Davis, nor Chiles have been able to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district. Thus, in this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections. We recognize that this doctrinal development appears to conflict with the Supreme Court's initial pronouncements on this subject in *Chisom* and *Houston Lawyers*. This panel must, however, adhere to the reasoning of the en banc decisions of this court in *Nipper* and *SCLC* until either our circuit decides to revisit this issue *en banc* or we receive further guidance from the Supreme Court. *See United States v. Woodard*, 938 F.2d 1255, 1258 (11th Cir. 1991) (per

curiam) ("The law in this circuit is emphatic that 'only a decision by this court sitting *en banc* or the United States Supreme Court can overrule' " a prior decision of this court.) (quoting *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986)).

B. RACIALLY-CONSCIOUS SUBDISTRICTING

Although the district court found that Davis had failed to prove a Section Two violation because she had not proposed a permissible remedy under *Nipper* and *SCLC*, it ultimately did not rest its judgment on our Section Two precedents. Instead, the district court ruled that Davis's subdistricting proposal would amount to unconstitutional racial gerrymandering. Because we hold that there is no statutory Section Two violation, we do not believe that a constitutional analysis of Davis's proposed remedy should be necessary to our decision. Since the district court explicitly rested its decision on the constitutional issue, however, we think it necessary and appropriate to explain why we believe the district court to be in error.

As the district court correctly observed, a court must apply strict scrutiny to predominantly race-based redistricting or reapportionment plans. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490, 132 L. Ed. 2d 762 (1995). In order to determine whether race is the predominant factor underlying a particular district's design, a court must find that a district-drawer has subordinated traditional, race-neutral districting principles (such as geographical compactness, contiguity, and respect for political subdivisions) to race. *See, e.g., id.* at

919, 115 S. Ct. at 2489. A court may base such a finding either on circumstantial evidence regarding a district's shape and demographics or on direct evidence of a district-drawer's purpose. *See, e.g., id.* at 916, 115 S. Ct. at 2488.

Applying these rules, the district court relied on the testimony of one of Davis's experts, Dr. E. Walter Terrie, to hold that Davis's remedy subordinated traditional redistricting criteria to race and therefore that strict scrutiny should apply.[21] Then, because the court believed that Davis could not satisfy the first *Gingles* factor as would be required to prove a violation of Section Two, the court held that Davis could not point to a compelling interest to justify her plan. As a result, the district court held that Davis's proposal would be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

On appeal, Davis contends that the district court's legal analysis contradicts the Supreme Court's holding in *Gingles* that a Section Two plaintiff must show that it would be possible to draw a majority-black district. Davis also argues that, regardless of the legal rule applied, the district court erred in concluding that race is the predominant factor underlying Davis's modified subdistricting plan. We review the district court's findings of fact for clear error, *cf. Miller*, 515 U.S. at 917, 115 S. Ct. at 2488, and its analysis and application of the law *de novo*, *see Gingles*, 478 U.S. at 79, 106 S. Ct. at 2781.

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[21] Dr. Terrie based his testimony primarily on a report that he and Jerry Wilson jointly authored for the plaintiffs. *See generally* Pl. Exh. 21.

Notwithstanding the polemics regarding race-based redistricting that pervade Chiles's brief to this court,[22] we agree with Davis that the district court has misread the applicable law. Of course, the district court is correct that no government may use race as a predominant factor in drawing electoral districts without a compelling interest. *See Miller*, 515 U.S. at 920, 115 S. Ct. at 2490. The district court's attempt to apply authorities such as *Miller* to this Section Two case, however, is unpersuasive, because the *Miller* and *Gingles/Nipper/SCLC* lines address very different contexts. In *Miller*, the Supreme Court analyzed bizarrely-drawn Congressional districts in which there was "powerful evidence" that "every [objective districting] factor that could realistically be subordinated to racial tinkering in fact suffered that fate." *Miller*, 515 U.S. at 919, 115 S. Ct. at 2490 (alteration in original) (quoting *Johnson v. Miller*, 864 F. Supp. 1354, 1384 (S.D. Ga. 1994)). In *Gingles*, *Nipper*, and *SCLC*, however, the Supreme Court and this circuit examined at-large voting districts that, at least on their face, did not reflect racial gerrymandering but instead were alleged to support racially-polarized voting. Within this particular context, we have sensibly required that plaintiffs claiming illegal vote dilution show that minority voters are sufficiently geographically compact to allow construction of minority-majority districts; otherwise, minority voters' failure to elect their

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[22] Although Chiles repeatedly characterizes Davis as "feckless" in his submissions to this court, we do not find such ad hominem attacks to be helpful to our decision. We find it surprising and regrettable that Chiles's counsel has chosen to abandon the decorum, and the respect for opposing parties and counsel, that we expect from members of our bar.

preferred candidates does not reflect illegal vote dilution but rather the natural result of the dispersion of the minority group across an area in which white voters constitute a majority. *See Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67; *cf. Bush v. Vera*, 517 U.S. 952, ___, 116 S. Ct. 1941, 1951, 135 L. Ed. 2d 248 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.").[23] Under *Gingles*, a plaintiff such as Davis must demonstrate as part of her prima facie Section Two case that the relevant "minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766. In interpreting this *Gingles* factor in the context of at-large judicial elections, we have further held that "inquiries into remedy and liability . . . cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Nipper*, 39 F.3d at 1530-31 (plurality opinion), 1547 (Edmondson, J., concurring); *SCLC*, 56 F.3d at 1289, 1294-97 ("[P]laintiffs must show that an appropriate remedy can be fashioned."). Thus, contrary to the

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[23] Moreover, although *Gingles*, *Nipper*, and *SCLC* would not support the judicial imposition of an electoral district drawn solely (or predominantly) to reflect racial considerations absent a compelling interest, a majority of the Supreme Court has assumed that the need to remedy a Section Two violation itself constitutes a compelling interest, *see Vera*, 517 U.S. at ___, 116 S. Ct. at 1960 (collecting cases), as have both parties to this litigation in their pretrial stipulations, *see* R8-260 ¶13 at 4 ("All states have a strong interest in eliminating vote dilution and the past exclusion of minorities from elected office, wherever found.").

district court's holding, our precedents *require* plaintiffs to show that it would be possible to design an electoral district, consistent with traditional districting principles, in which minority voters could successfully elect a minority candidate. To penalize Davis, as the district court has done, for attempting to make the very showing that *Gingles, Nipper,* and *SCLC* demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action.

Further, a review of the record reveals that Davis's proposed subdistricts are not based predominantly on race. Significantly, Chiles has not been able to identify a single traditional redistricting principle which Davis's subdistricting scheme would violate. Davis's subdistricts are compact; they are contiguous; and they respect precinct borders. *Cf. Shaw v. Reno,* 509 U.S. 630, 647, 113 S. Ct. 2816, 2827, 125 L. Ed. 2d 511 (1993) (discussing traditional districting principles) (*"Shaw I"*). To refute the seeming inoffensiveness of Davis's plan, Chiles and the district court point only to testimony by Terrie, an architect of Davis's subdistricts, that "it was his charge to draw black majority subdistricts in the two 'nucleuses within the circuit . . . in which black voters tend to be concentrated.' " R8-277 at 34 (district court opinion). Although we agree with the district court that direct evidence that an election district was designed to discriminate against a particular racial group should trigger strict scrutiny, we do not believe that the record supports the conclusion that such a purpose motivated Terrie's subdistricting plan. Certainly, race was a factor in Terrie's process of designing the proposed subdistricts; under *Gingles, Nipper,* and *SCLC,* we *require* plaintiffs to show

that it is possible to draw majority-minority voting districts, and plaintiff Davis and her expert Terrie wished to meet this burden. Throughout his testimony, though, Terrie insisted that race was not the predominant factor motivating his design process.[24] Further supporting Terrie's characterization of his work, he testified that he did not "begin in the majority black area and work out," *see* R16-121, nor did he maximize the number of majority-minority subdistricts, *see id.* at 144. In fact, Terrie testified that it would have been difficult for him to have drawn subdistricts for the Second Circuit and Leon County Courts *without* creating at least two majority-minority districts. *See id.* at 146. Absent some evidence belying Terrie's characterization of his design process, Chiles cannot rely solely on criticism of Terrie's motivations to block Davis's proposed remedy. Given Terrie's testimony, together with the unchallenged adherence of Davis's proposed plan to traditional redistricting criteria, we conclude that the district court committed clear error in

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[24] On cross-examination, for example, Terrie discussed the issue:

> Q: Dr. Terrie, would you please, briefly, describe what you were asked to do in this case?
>
> A: Yes. I was asked to see whether it was possible, utilizing traditional redistricting criteria, to draw a plan that would include at least one majority-minority district within the Second Judicial Circuit and also within Leon County itself.
>
> Q: Did you conclude that it was possible to draw such districts with traditional redistricting criteria?
>
> A: Yes, I did.

R16 at 104.

finding that Davis's proposed remedy constitutes a racial gerrymander. Thus, we hold both that the district court misinterpreted the law regarding the role of race in assessing permissible remedies for violations of Section Two and that the district court incorrectly assessed the role that race played in the drawing of Davis's proposed subdistricts.

III. CONCLUSION

In this case, Davis has presented persuasive evidence of racially polarized voting in elections for judgeships on the Second Circuit and Leon County Courts. Nonetheless, Davis has failed to propose a permissible remedy under our precedents. We agree with Davis that the district court erred in its holdings that Davis's modified subdistricting plan would involve unconstitutional racial gerrymandering and inject race into Florida's judicial administration. Nonetheless, our precedents compel us to conclude that Florida's interests in maintaining its Constitution's judicial election model and preserving linkage between its judges' jurisdictions and electoral bases, considered together, outweigh Davis's interest in the adoption of her proposed remedy. As a result, we hold that Davis has not proven a violation of Section Two. Therefore, we AFFIRM the district court's judgment in Chiles's favor.

FAY, Senior Circuit Judge, concurring specially:

I concur in sections I, IIA, 1 through 4, of the opinion for the court. It seems to me that Section IIB is simply unnecessary and therefore dicta with which I disagree but find no need to discuss. I do concur in footnote 22.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ANITA L. DAVIS, et al.,

Plaintiffs,

v.

CASE NO.
TCA 90-40098-MMP

LAWTON CHILES, et al.,

Defendants.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 16-17, 1996, the Court held a bench trial in this cause on several issues discussed in its August 5, 1995 order (Doc. 228).[1] In summary, this is a class action for declaratory and injunctive relief challenging the current at-large system of electing judges to the Second Judicial Circuit of the State of Florida and to the Leon County Court (Leon County, Florida). Plaintiffs' only remaining claim is that the at-large circuitwide and countywide election of judges for the Second Judicial Circuit and Leon County unlawfully dilutes the voting strength of African-Americans thereby denying them an equal opportunity to participate in the political process and elect candidates of their choice, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended.

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[1] The procedural history of this cause is set out in that order. *See* Doc. 228 at 2-4.

This case has come full circle. Since the court originally entered judgment for the plaintiffs in 1992,[2] the Eleventh Circuit and United States Supreme Court have significantly enhanced the jurisprudence governing claims brought under the Voting Rights Act. In light of those intervening decisions, and all of the admissible evidence contained in the record, the Court must now find that plaintiffs have failed to establish Section 2 liability. Consequently, judgment is entered for the State defendants.

DISCUSSION:

Plaintiffs have been designated as class representatives for classes consisting of (1) all black residents of Florida's Second Judicial Circuit, and (2) all black residents of Leon County. *See* Doc. 108. Since the plaintiff class representatives reside within these two geographical areas, they have standing to prosecute this action. *See, e.g., Shaw v. Hunt* ("*Shaw II*"), ___ U.S. ___, ___, S. Ct. ___, 64 U.S.L.W. 4437, 1996 WL 315870, at *3 (U.S. June 13, 1996) (No. 94-923); *Bush v. Vera*, ___ U.S. ___, ___ S. Ct. ___, 64 U.S.L.W. 4452, 1996 WL 315857, at *4 (U.S. June 13, 1996) (No. 94-805); *United States v. Hays*, 515 U.S. ___, 115 S. Ct. 2431, 2436-37, 132 L. Ed. 2d 635 (1995). The Court has subject matter jurisdiction under Title 28, United States Code, Sections 1331 and 1343. Venue is proper under Title 28, United States Code, Section 1391.

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[2] *See* Findings of Fact and Conclusions of Law (hereinafter "Findings"), Doc. 146. That judgment was later vacated by the Court when it set this matter for a retrial in light of *Nipper* and *SCLC*. *See* Doc. 228.

Plaintiffs have brought the instant challenge to the system of electing judges in Florida's Second Judicial Circuit and Leon County Court, pursuant to Section 2 of the Voting Rights Act. Section 2, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1373b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis in original). The Supreme Court has specifically held that the term "representatives," as defined by Section 2, includes judicial officers.

Chisom v. Roemer, 501 U.S. 380, 398-99, 111 S. Ct. 2354, 2366, 115 L. Ed. 2d 348 (1991).

The essence of a claim under Section 2 of the Voting Rights Act requires "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburgh v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25 (1986). Various non-statutory criteria set out in the Senate Report accompanying Section 2 are to be considered in evaluating a Section 2 vote dilution claim. *See* S. REP. No. 417, 97th Cong., 2d Sess. 20 6-07 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 206-07. However, before a plaintiff can demonstrate liability under Section 2, he or she must prove three threshold criteria: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the minority's preferred candidate is usually defeated by white majority bloc voting. *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766.

The Eleventh Circuit further clarified the *Gingles* preconditions in *SCLC v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (en banc), *cert. denied*, ___ U.S. ___, 116 S. Ct. 704, 133 L. Ed. 2d 660 (1996), and *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1795, 131 L. Ed. 2d 723 (1995). Under this controlling authority, the first *Gingles* threshold factor of geographic compactness, informed by the second factor of minority cohesiveness, "dictates that the issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases." *Nipper*, 39 F.3d at 1530-31, Chief Circuit Judge

Tjoflat's plurality opinion, in which Judge Anderson joined, further noted that the three *Gingles* factors essentially are used to evaluate two points: the existence of "racially polarized, legally significant racial bloc voting," and the existence of a remedy. *Nipper*, 39 F.3d at 1530 (Tjoflat, plurality opinion). The Court will concentrate its analysis solely on these two points.

I. Racially Polarized Voting:

The second and third *Gingles* preconditions to establishing a claim of vote dilution under Section 2 are a showing that black voters are politically cohesive and that candidates preferred by black voters are generally defeated by white bloc voting. Plaintiffs may establish political cohesion by showing that "a significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56, 106 S. Ct. at 2769. The voting preferences of the majority group must also be examined to determine whether "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67. If plaintiffs are successful in showing both of these preconditions, then they have demonstrated racially polarized voting that may serve as a partial basis for Section 2 liability.

The new evidence adduced at the retrial of this matter does not contradict the Court's previous finding of widespread racially polarized voting within Florida's Second Judicial Circuit and Leon County, Florida. *See*

Findings at 10-22. Furthermore, the parties have supplemented the record with additional stipulated facts of election results and other pertinent data which also sustain this finding. *See* Supplemental Pretrial Stipulation *(hereinafter "Supp. Stip.")*, Doc. 260. The discussion that follows is limited solely to this new evidence.[3]

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[3] The Court specifically finds that the new evidence supports its earlier conclusions on the following Senate factors: history of official discrimination in Florida generally, and more specifically in the Second Judicial Circuit and Leon County; present socio-economic effects of past discrimination; use of practices and procedures that may enhance the opportunity for discrimination against the minority group (including the size of the election districts being challenged, the majority vote requirement, use of a numbered place system, use of staggered terms, and judicial candidate filing fees); the absence of a candidate slating process; use-of racial appeals in campaigns; responsiveness on the part of elected officials to the particularized needs of members of the minority group; whether the policy underlying the state's use if an at-large election system for judges is tenuous; and the size of the candidate pool. *See Findings* at 22-38. Consequently, the Court will not revisit these factors, and instead incorporates by reference its findings as to each of these factors. For a more detailed discussion of the Senate factors, *see* S. REP. No. 417, 97th Cong., 2d Sess. 206-07 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 206-07, and *Findings* at 5-6.

In addition, the Court previously held that defendants could defeat a Section 2 claim if they could demonstrate "with evidence of objective factors that, under the totality of the circumstances, the voting community is not driven by racial bias." *Findings* at 9. However, the Court notes that in light of the *Nipper* decision, there is still no majority opinion in the Eleventh Circuit holding that a "racial bias" test applies in cases brought under Section 2 of the Voting Rights Act. The Eleventh Circuit was equally divided on this issue in *Solomon v. Liberty County* (899 F.2d 1012 (11th Cir. 1990) (en banc), *cert. denied*, 498 U.S.

On the issue of racially polarized voting, the Court heard new testimony and took reports from the same experts used by the parties in the initial trial of this matter. *See Findings* at 11-12. Plaintiffs relied upon the testimony and report of Dr. Allan Lichtman, a Professor of History at the American University in Washington, D.C. Defendants relied upon the report of Dr. Ronald Weber, Professor of Government at the University of Wisconsin, and Dr. Joan Haworth, a former Professor of Economics at Florida State University and currently the president of a private consulting company. All these witnesses are veterans of Voting Rights Act litigation throughout the country.

The experts each used bivariate ecological regression analysis and extreme case analysis to study the voting behavior of the circuit and county electorates. Bivariate ecological regression and extreme case analysis are methods approved by the Supreme Court in *Gingles* [*see* 478 U.S. at 52-53 n.20, 61, 106 S. Ct. at 2767 n.20, 27721, and have been used in numerous other Section 2 cases.

1023, 111 S. Ct. 670, 112 L. Ed. 2d 663 (1991)] , and in *Nipper* [39 F.3d at 1494], only one other judge joined Chief Judge Tjoflat's opinion with respect to its discussion of the "racial bias" test. The four concurring judges in Nipper did not reach that issue, and the dissenters disagreed with the imposition of a "racial bias" test. The *SCLC* decision [56 F.3d at 1281], did not state whether a showing of "racial bias" in the voting community is necessary. This Court will not now resolve an issue that the Eleventh Circuit has unsuccessfully wrestled with the last decade. As a result, for the present Section 2 challenge, none of the parties will be required to make a showing of the presence or absence of racial bias within the Second Judicial Circuit and Leon County.

See, e.g., SCLC, 56 F.3d at 1290-91; *Nipper*, F.3d at 1505-06 & n.20. The Court previously discussed these forms of methodology. *See Findings* at 13.

Although Dr. Lichtman's Section 2 analysis suffered from many flaws,[4] the Court finds it more persuasive

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[4] Defendants point out several flaws in Dr. Lichtman's testimony concerning consideration of split-preference elections, many of which have been criticized by other courts considering proof of racial polarization. *See SCLC v. Sessions*, 56 F.3d at 1293; *Johnson v. Mortham*, F. Supp. ___, ___, 1996 WL 189235, at *8 (N.D. Fla. Apr. 17, 1996) (three judge panel). For example, Dr. Lichtman analyzed only those elections in which a black candidate was in the race. Lichtman Test., Tr. at 59-60. He chose not to analyze split-preference elections, instead looking at and relying upon Dr. Weber's report on this issue, even though there were some split-preference judicial elections wherein the candidate of choice of black voters was successful. *Id.* at 71. In addition, Dr. Lichtman combined partisan non-judicial elections with selected judicial elections in conducting his analysis. *Id.* at 48-58, 62; Pl. Ex. 20 *(hereinafter "Lichtman Report")*. The Eleventh Circuit has expressly found that such [l]umping together [of] all elections, judicial and nonjudicial alike, creates a risk of glossing over the significant differences between the (nonjudicial) and judicial arenas." SCLC 56 F.3d at 1293. Finally, Dr. Lichtman has apparently adopted the erroneous view that proportional or near-proportional representation on the circuit and county courts is necessary for compliance with Section 2. *See* Lichtman Test., Tr. at 84-85. Such a view flies in the face of case law in this Circuit. *See, e.g., White v. State of Alabama*, 74 F.3d 1058, 1073 (11th Cir. 1996); *Johnson v. Mortham*, ___ F. Supp. at ___, 1996 WL 189235, at **20-21.

Notwithstanding these flaws in Dr. Lichtman's analysis, the Court finds that they do not disturb the accuracy of his underlying conclusion that racially polarized voting is evident to a significant degree within the areas in question.

than the analysis of defendants' experts.[5] Hence, as outlined below, the Court will not disturb its earlier finding that racially polarized voting exists in judicial elections within Florida's Second Judicial Circuit and Leon County.

A. Judicial Elections Involving Black Candidates

In its initial decision, the Court noted that "the evidence of racial polarization in this case is stronger than that on which findings of racial polarization were made in *Gingles* and other cases." *Findings* at 17. Since the time of that 1992 decision, two additional judicial elections have occurred in which black candidates competed against white candidates and were defeated despite strong support from black voters.

In the 1992 Leon County Court race, black voters gave approximately 98% of their votes to the black candidate, but white voters gave only about 32% of their vote to the black candidate, based on ecological regression analysis. The white candidate, who received 68% of the white vote, was therefore elected despite receiving only 2% of the black vote. Lichtman Test., Tr. at 17; *Lichtman Report* at Table 1.

In a 1992 race for the Gadsden County Court, 71% of black voters supported the black candidate in that election, while only 23% of white voters supported the black candidate, based on ecological regression analysis. *Id.* Although Gadsden County has slight majority of black

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[5] A specific discussion of the analysis of defendants' expert, Dr. Haworth, is contained below.

registered voters, the combination of higher rate of turnout among whites and a high degree of white bloc voting for the white candidate resulted in the defeat of the candidate preferred by black voters. *Lichtman Report* at Table 13 (reporting turnout rates); Lichtman Test., Tr. at 98-99.[6]

Defendants' expert, Dr. Joan Haworth, obtained virtually the same results when she performed ecological regression analysis of the 1992 Leon County Court and Gadsden County Court elections. Defs.' Ex. 31 (*hereinafter "Haworth Report"*) at Table 12. Furthermore, the racially polarized voting demonstrated by the regression results was corroborated by extremely high values of the squared correlation coefficient, statistical significance exceeding conventional standards, and the results of extreme case analysis. *Lichtman Report* at 2-3.

Thus, since 1980, black candidates have run in contested judicial elections within the Second Judicial Circuit a total of five times, and in each election voting was racially polarized and the black candidate was defeated despite strong support from black voters. *Lichtman Report*

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[6] Dr. Lichtman also determined that even if the rate of "roll-off" for black voters in the judicial elections had been the same as the rate for white voters, the black candidates in both elections would have been defeated because of racially polarized voting. Lichtman Test., Tr. at 19-20. "Roll-off" refers to "the number of voters who sign in at the polls but fail to cast a vote for a particular election on the ballot." *Nipper*, 39 F.3d at 15-8 (Tjoflat, plurality opinion).

at 2. *See also Findings* at 16-17 (making findings on pre-1992 elections).[7]

B. Judicial Elections Involving White Candidates

Elections offering voters the choice of a white or black candidate are most probative in revealing the presence of legally significant racially polarized voting. *See Nipper*, 39 F.3d at 1540 (11th Cir. 1994) (Tjoflat, C.J., plurality opinion); *Johnson v. Mortham*, ___ F. Supp. at ___ n.21, 1996 WL 189235, at *8 n.21. *Cf, SCLC*, 56 F.3d at 1293 (noting that the district court had given more weight to black-vs.-white elections than to white-vs.-white elections). Chief Judge Tjoflat's opinion in *Nipper* notes that white-vs.-white elections may also be probative, if the results of so-called "split-preference" elections are examined. 39 F.3d at 1541. "Split-preference" elections are those in which white and black voters preferred different candidates. *Id.* As a result, this Court ruled that "to the extent the parties can present proof of 'split preference' elections not involving African-American candidates, that proof may be used to supplement the record in this case." Doc. 228 at 17.

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[7] These include the 1980 election for Second Judicial Circuit in which Robert Travis ran; the 1984 Second Judicial Circuit election in which Roosevelt Randolph ran; the 1988 Leon County Court election in which Erroll Powell ran; the 1992 Leon County Court election in which Carolyn Cummings ran; and the 1992 Gadsden County Court election in which Marva Davis ran (Gadsden County is within the Second Judicial Circuit, although the Gadsden County Court itself is not being challenged in this litigation).

In the instant case, the trial evidence showed that even if the race of the candidates is disregarded, the candidates preferred by black voters (using the definition of the State's expert witness, Dr. Weber) were defeated in 82%. of the judicial elections where the preferences of black and white voters differed. Pls.' Ex. 18. As plaintiffs' expert, Dr. Lichtman, explained, there were 11 elections for the Second Judicial Circuit or Leon County Court in which the preferences of white and black voters differed. In 9 of those elections the candidate preferred by white voters prevailed and the candidate preferred by black voters did not, according to Dr. Weber's criteria for determining voter preferences. However, the two split-preference elections in which the black-preferred candidate "won" under Dr. Weber's criteria are difficult to classify as meaningful "wins." In one, the 1984 Leon County primary Group 3 election, a black-preferred candidate, Judy Curtin, was successful in advancing to a runoff, but then ultimately lost in the runoff, despite black support. *Lichtman Report* at 5; *Supp. Stip.* at ¶ 3. In the other, the 1988 general election for Leon County Judge Group 4, the black candidate who was strongly preferred by black voters had already been defeated in the primary for that seat, prior to the general election. *Supp. Stip.* at ¶ 4. Thus, in split-preference elections, the first choice of black voters has *never* been elected to a judgeship.[8]

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[8] In the Supplemental Pre-trial Stipulations, the parties listed those elections which they were able to identify by agreement as "split-preference" elections. That list includes nine elections, and in seven of those elections the black-preferred candidate was defeated. *Supp. Stip.* at ¶¶ 1-4. *See* Lichtman Test., Tr. at 23. Dr. Lichtman's analysis includes two

Consequently, it is clear that, even when white-vs.-white elections are included, the results of split-preference elections provide further confirmation of the vote dilution caused by the current system: they show that black voters rarely act as an effective swing vote to decide the outcome of judicial elections, regardless of the race of the candidates.

C. "Exogenous" Elections

The evidence presented at the 1991 trial included analyses of additional elections for nonjudicial office, sometimes-called "exogenous" elections. *See Findings* at 11, 14-1G. Since the time of trial, one additional black candidate has run for a statewide office, and three additional black candidates have run for countywide office in Leon County. All of these were partisan elections.

The candidate for statewide office, Doug Jamerson, was defeated in an election for Commissioner of Education, but obtained a majority of the total vote in Leon County. In the Democratic Primary, Jamerson received 95% of the black vote and 65% of the white vote, while in the general election Jamerson received an estimated 100% of the black vote and 55%. of the white vote. *Lichtman Report* at Table 3. As a result, while blacks supported Jamerson more strongly than whites, the majority of

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additional elections in which, based on Dr. Weber's ecological regression estimates, white and black voters preferred different candidates and the black candidate lost. *Id.* However, no matter which set of split-preference elections is consulted, the candidates preferred by black voters were usually defeated. *Id.*

blacks and whites supported Jamerson in Leon County. On an overall basis, reviewing all of the statewide or circuitwide exogenous elections that Dr. Lichtman has analyzed since the outset of this action, and including the Jamerson election, black voters supported the black candidates at landslide levels[9] or greater in 10 of 11 such elections, while white voters supported the white candidates at landslide levels or greater in 8 of 11 elections. *Lichtman Report* at 3. *See also Findings* at 10-17 (reviewing pre-1992 elections)

Of the three black candidates to run for nonjudicial countywide office since 1992, two were defeated (Proctor, for school superintendent, and Riley, for county commission at-large), and one was elected (Rudy Maloy, for county commission at-large). Dr. Lichtman performed ecological regression and extreme case analysis on the primary, runoff, and general election in which Maloy participated, and on the primary elections in which Proctor and Riley participated, a total of five elections. In four of these five elections, a substantial majority of black voters supported the black candidates. Lichtman Test., Tr. at 27; *Lichtman Report* at Table 5. With respect to white bloc voting, a majority of white voters supported the white candidates in four of the five elections. Lichtman Test., Tr. at 27. In one election, the 1992 general election for county commissioner, Rudy Maloy, a former Florida State University football star [Travis Test., Tr. at 198], received 69% of the white vote, making him the only

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[9] Dr. Lichtman has previously testified that 60% or greater support for a particular candidate is generally regarded as a landslide level of support.

black candidate in the last 20 years to win office against a white candidate in countywide voting.

On an overall basis, reviewing all the countywide exogenous elections that Dr. Lichtman has analyzed since the outset of the case, black voters opted for black candidates at landslide levels or greater in 26 of 28 contests. White voters, by contrast, opted for white candidates at landslide levels or greater in 22 of the 28 contests, and gave at least a majority of their vote to the white candidates in 26 of 28 elections. *Lichtman Report* at 3-4; Lichtman Test., Tr. at 30.

Based on his analysis of numerous elections, Dr. Lichtman concluded that, to win a countywide election in Leon County, a black candidate will generally need in excess of 40% white crossover support. Lichtman Test., Tr. at 31. Indeed, no black candidate has ever been elected in countywide voting without receiving at least 47% of the white vote. *Id.* at 34. None of the black candidates for the Second Judicial Circuit or the Leon County Court have ever received that kind of support from white voters. In fact, the average level of white voter support for black judicial candidates has been only 20%. This is actually a little lower than the average level of 28% white crossover support which black candidates have received in the exogenous elections.[10] Lichtman Test., Tr. at 31-32.

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[10] This 28% average white crossover figure for exogenous elections is the same whether the results of all exogenous elections are included, or whether only those elections from 1980 through 1992 are included. Lichtman Test., Tr. at 32.

Defendants' expert, Dr. Joan Haworth, did not dispute the results Dr. Lichtman obtained from the statistical analysis of election results which he conducted. Her effort to dispute the presence of legally significant white bloc voting was flawed by her reliance on arbitrary numerical definitions of bloc voting rather than the functional definition prescribed by *Gingles*, her reliance on elections involving only a tiny subset of eligible county voters, and her failure to use consistent criteria in selecting elections for analysis.

For example, in Table 9 of her report, Dr. Haworth reports the results of extreme case analysis for seven elections, and concludes that in 6 of 7 elections the black candidates received more than 10% of the white vote. *Haworth Report* at 9. On cross-examination, however, Dr. Haworth conceded that a black candidate cannot win election with only 10% of the white vote, but instead will generally need in excess of 35 or 36% of the white vote.[11] Haworth Test., Tr. at 173-74. Dr. Haworth further admitted that in four of the seven elections in her Table 9, the black candidate received less than 35% of the white vote. *Id.* at 74. Of the other three elections, one was not a

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[11] This Court previously criticized Dr. Weber for employing an arbitrary definition requiring 80% white support for white candidates and black support for black candidates before concluding that polarized voting was legally significant. *Findings* at 21. Now, Dr. Haworth apparently would impose an even more stringent definition, such that whites are not deemed to engage in bloc voting when a black candidate receives anything over 10% of the white vote (corresponding to a 90% white vote for white candidates). *See Haworth Report* at 9.

countywide election at all, but an election from a majority-black single-member school board district, where it is hardly surprising that a black candidate could receive a majority of the vote. *Id.* at 174-75.[12] The other two elections both involved the same candidate, Rudy Maloy, competing in a runoff and then a general election. For reasons she was unable to explain, however, Dr. Haworth neglected to include the results of Mr. Maloy's first primary race that year, in which he received only 22% of the white vote according to Dr. Lichtman's analysis. *Id.* at 178-79.

Dr. Haworth ultimately admitted that the set of elections on which she relied for her conclusions was "certainly a selected set of elections," *id.* at 169, and she was unable to identify any basis for excluding numerous countywide elections that she overlooked. *Id.* at 180-81, 184-85.

Finally, Dr. Haworth testified that black voters enjoy an equal opportunity to elect candidates of their choice because in 13 out of 22 judicial elections, whether involving black candidates or only white candidates, the candidate preferred by a majority of black voters was elected. *Id.* at 188-89. Dr. Haworth admitted, however, that this

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[12] In 1992, this Court criticized Dr. Haworth's reliance on Tallahassee municipal elections, because "black candidates for the Second Judicial Circuit and Leon County Court must face voters in the entire circuit or the entire county, not just Tallahassee." *Findings* at 19. The ability to win a municipal election therefore could not prove a similar ability to win a countywide race. Obviously, the same criticism applies with greater force to Dr. Haworth's reliance on an even smaller subunit, such as a single-member school board district.

figure did not distinguish the split-preference elections from the larger set of elections. *Id.* at 189.

Defendants also placed a lot of weight on election results from a small number of precincts. Specifically, defendants maintained that based on these results, certain white candidates were the preferred candidates of choice for black voters. For example, defendants claimed that Kathleen Dekker [a white candidate] was the preferred candidate of black voters in the 1988 Leon County Court election, based on the results in seven majority-black precincts. However, four of the seven precincts on which defendants rely are not homogeneous precincts as defined by the experts in this case (that is, precincts that are more than 90% black or 90% white). A *majority* black precinct is not necessarily a *homogeneous* precinct. There is no valid basis for drawing overall conclusions about black voting behavior based on election results in selected nonhomogeneous precincts.[13] Lichtman Test., Tr. at 70, 99. Indeed, defendants' own expert, Dr. Weber, contradicts the State's proposed findings on this election, because his ecological regression analysis reports that Judge Dekker was *not* the preferred candidate of black voters in the 1988 election. Defs.' Ex. 4 (*"Weber Report"*),

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[13] Even when homogeneous precinct analysis is properly performed, it includes by definition only a small number of the precincts that participated in the election, making it a somewhat less reliable indicator of overall voting behavior than ecological regression analysis, which employs data from all of the precincts that participated in the election. Lichtman Test., Tr. at 99.

Attach. B.[14] Consequently, the Court can give little weight to the probative value of the results from these small numbers of majority-black precincts.

D. Extent of Black Electoral Success

No black person has ever won a contested election for the Second Judicial Circuit or the Leon County Court. This lack of black electoral success is an important factor supporting a finding of unlawful vote dilution under Section 2. *Gingles*, 478 U.S. at 48 n.15, 106 S. Ct. at 2765-66 n.15. Moreover, as discussed above, black candidates have had very little success in circuitwide voting or countywide voting for any office in the Second Judicial Circuit or Leon County.

E. Other Factors Pertinent to Judicial Elections

Two additional factors may be particularly important in the context of evaluating judicial elections under Section 2: Success in the appointment process, and the effect of incumbency.

1. Success in the appointment process

Success in the appointment process tends to be highly probative in judicial elections. *See SCLC*, 56 F.3d at 1293 n.22; *Nipper*, 39 F.3d at 1535-36 & n.81 (Tjoflat, plurality opinion) Under Florida's partial "Missouri Plan" –

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[14] Moreover, Judge Dekker had the advantage of incumbency, having been appointed to her office several months prior to the 1988 election. *Supp. Stip.* at ¶ 61.

triggered when mid-term judicial vacancies occur through the loss of a circuit or county court judge before the end of a term, or through the creation of additional circuit or county court judgeships before the next judicial election [*see* Fla. Const. art. 5, § 11(b)] – judges may be initially appointed to their positions by the Governor after being nominated by an appropriate judicial nominating commission.

However, in the case at bar, election – rather than appointment – has been the primary route to a Second Circuit judgeship, with seven of the eleven currently serving judges initially elected rather than appointed to their positions (seven of ten at the time of the 1991 trial). *Lichtman Report* at 5. Circuit Judge Nikki Clark, appointed in 1993 after the initiation of the present cause, is the first and only black to be appointed to the bench within the Second Judicial Circuit. The election or appointment of a minority following the onset of Section 2 litigation is generally entitled to little weight. *Gingles*, 478 U.S. at 76 & n.37, 106 S. Ct. at 2779 & n.37.

Furthermore, no black lawyer has ever been appointed to the Leon County Court, where three of the four sitting judges were initially appointed to the bench. Thus, both the election and the appointment process have been completely closed to minority candidates seeking a county court seat.

Accordingly, in this case, the record concerning appointments confirms the lack of equal political opportunity which results from the current selection system.

2. Effect of incumbency

The effect of incumbency on judicial elections is also relevant to a Section 2 analysis.[15] *See SCLC*, 56 F.3d at 1293, n.22; *Nipper*, 39 F.3d at 1536 (Tjoflat, plurality opinion) ("incumbency is often the determining factor in judicial elections . . . [and] should play a crucial role in the vote dilution inquiry").

Nevertheless, incumbency does not explain the racially polarized voting patterns found here. Each of the black-vs.-white judicial elections which this Court discussed in concluding that voting was racially polarized in 1992 was an election for an open seat. Only the two most recent black-vs.-white judicial elections involved a challenge to an incumbent. Of course, in the absence of open seats, the only means by which black candidates can seek election to the bench is by running against the incumbents, who are all white (except for the one black judge appointed in 1993). Furthermore, when black candidate Carolyn Cummings ran against an incumbent in 1992, the racial voting patterns that resulted in Leon County were virtually identical to those seen in Roosevelt Randolph's race for an open seat in 1984. Lichtman Test., Tr. at 96-98. The evidence shows that regardless whether the black candidate was running for an open seat or against an incumbent, the result was the same: the black candidates were defeated.

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[15] "Incumbency," as used by the Court, refers to the number of incumbents who were unopposed in judicial elections, as well as the success of judicial incumbents.

F. Summary

In sum, the results of the post-trial elections confirm the presence of racially polarized voting within the Second Judicial Circuit and Leon County. As a result, plaintiffs have shown the second and third *Gingles* preconditions [e.g., political cohesion and white bloc voting] to Section 2 liability.

II. Existence Of A Remedy:

The first *Gingles* threshold factor of geographic compactness, informed by the second factor of minority cohesiveness, "dictates that the issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases." *Nipper*, 39 F.3d at 1530-31. According to the *Nipper* court, the inquiries into remedy and liability cannot be separated. *Id.* Instead, a "district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system." *Id.* at 1531, 1533.

A significant limitation therefore exists in determining whether a remedy is possible: any remedy must exist "within the confines of the state's judicial model [and] . . . not undermine the administration of justice." *Id.* at 1531. Remedies requiring a state to alter the size of its elected bodies to comply with Section 2 are improper because they would not be "within the confines of the state's judicial model." *Id.* at 1532 & n-75. Under the totality of the circumstances inquiry, if Section 2 plaintiffs are unable to demonstrate a remedial plan that meets

these requirements, then "it follows that the voting practice cannot be challenged as dilutive under § 2." *Nipper*, 39 F.3d at 1533 (quoting *Holder v. Hall*, 114 S. Ct. 2581, 2586, 129 L. Ed. 2d 687 (1994)).

The Court will first outline the remedies proposed by plaintiffs. The Court will then analyze these remedial alternatives to determine whether they comply with the dictates of *Nipper* and *SCLC*, as well as the Supreme Court's recent jurisprudence.

A. Plaintiffs' proposed remedies

Plaintiffs offered the expert testimony and reports of three individuals on the issue of whether a remedy could be developed within the confines of the State of Florida's judicial structure. Jerry Wilson[16] and Dr. Edward Walter Terrie[17] prepared a report addressing the question of whether one or more majority black election subdistricts could be drawn, purportedly consistent with traditional redistricting principles, for the Second Judicial Circuit and Leon County Court. *See* Pls.' Ex. 21 (*hereinafter "Wilson-Terrie Report"*) Dr. Richard Engstrom, a Political Science Professor from the University of New Orleans who specializes in elections systems and minority representation, testified about certain remedial alternatives that could be used in conjunction with the subdistricts

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[16] The plaintiffs' demographic expert who testified at the 1992 trial concerning the drafting of districts.

[17] A demographer at the Center for the Study of Population at Florida State University.

presented in the *Wilson-Terrie Report*. *See also* Pls.' Ex. 22 (*hereinafter "Engstrom Report"*).

1. Creation of black majority-minority subdistricts:

African-Americans comprise 28.9% of the overall population, 26.1% of the voting age population ("VAP"), and 25.1% of the registered voters of Florida's Second Judicial Circuit.[18] African-Americans comprise 24.25% of the overall population, 22.2% of the VAP, and 21.8% of the registered voters of Leon County. *Wilson-Terrie Report* at 5. Jerry Wilson and Dr. Terrie used the 177 voting districts within the Second Judicial Circuit to devise new election districts at the circuit court level, and the 138 voting districts within Leon County to devise new election districts for the Leon County Court.

The goal of the *Wilson-Terrie Report*, according to the authors, was to draw one or more black majority-minority districts in the Second Judicial Circuit (for election of Circuit Court judges) and in Leon County (for election of Leon County Court judges) using traditional redistricting principles, without "maximizing" the number of majority-black districts.[19] More specifically, the experts drew

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[18] This includes the populations of Franklin, Gadsden, Jefferson, Leon, Liberty, and Wakulla Counties.

[19] It does appear, however, that the *Wilson-Terrie Report* adopted a "proportionality" policy in drawing the new subdistricts, to the extent that such subdistricts could be drawn using traditional redistricting criteria. *See* pages 37-38, *infra*. For a discussion of the difference between "maximization" and

the districts using existing precinct boundaries, without splitting precincts in any of the proffered plans. In addition, the experts claim they used other criteria such as contiguity, compactness, minimum deviation from one-person, one-vote, respect for traditional political boundaries, and preservation of communities of interest including the urban-rural distinction within the circuit. Finally, the experts represent that they utilized multi-member districts for the Circuit Court, to keep down the total number of election districts.

a. Second Judicial Circuit Court plans

The experts propose five different plans for judicial elections to the Second Judicial Circuit Court (Circuit Court plans A-E).[20] Two of the counties, Leon and Gadsden, are split in Circuit Court plans A, B, C, and E. The ideal population for each circuit district is 24,875 based on eleven single-member seats, the present number of seats within the Second Circuit. *See Wilson-Terrie Report.*[21]

"proportionality" policies, *see Johnson v. Mortham*, ___ F. Supp. at ___ & nn. 50, 54, 1996 WL 189235, at **20-21 & nn. 50, 54.

[20] Maps of the five proposed Circuit Court plans and population data for those plans are provided as Attachment A to this order.

[21] The one-person, one-vote principle is inapplicable to judicial elections. *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972) (three judge panel), *aff'd*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973). *See also Nipper*, 39 F.3d at 1510 n.33 (citing *Wells*). Nevertheless, the population deviations. are provided for illustrative purposes of plaintiffs' various subdistricting schemes.

Circuit Plan A uses a "5-2, 1-1", scheme (that is, five multi-member districts and one single-member district). Gadsden County, which has a 57.7% majority-black population, 52.4% black VAP, and 47.6% black registered voter population, is offered as the one single-member district, district 2. The remaining five multi-member districts include a two-seat majority black district, district 6, inside Capital Circle in the southern part of Tallahassee. The overall population deviation between districts is 12.62%, including – 8.98% in district 6.

Circuit Plan B is essentially the same as Circuit Plan A, but with a lower population deviation. The black VAP in district 6 is lowered to 49.57% but the black registered voter population remains well over 50%. The overall population deviation between districts is 7.88%

Circuit Plan C moves district 2 to the western part of Gadsden County, and remains majority-black according to population, VAP, and voter registration. The majority black district in Leon County, district 6, is the same as under Circuit Plan B. Minor adjustments were made to the other four multi-member districts in order to balance population. The overall population deviation between districts is 7.02%

Circuit Plan D uses a "4-2, 1-3" scheme (that is, four two-member districts and one three-member district). This plan creates two 2-member districts that have majority-black populations, districts 2 and 4, giving blacks the opportunity to elect four of the eleven circuit judges. District 2 has a majority-black VAP, with blacks comprising 48.85% of the district's registered voters. District 4, situated in Tallahassee, has a black VAP of 46.83%, but a

majority-black registration of 53.58%. The plan avoids creation of a single district in Gadsden County. The plan's overall population deviation is slightly less than 10%, but is – 7.63% in district 2.

Circuit Plan E strives "to give each county its optimum ability to control the election of as many judges as possible. *Wilson-Terrie Report* at 7. The plan uses a "3-2, 5-1" scheme (that is, three two-member districts and five one-member districts). Leon County is given six seats through the three 2-member districts. The five single-member districts are drawn from the remaining portions of the Second Circuit. According to plaintiffs, this plan gives each county a share of influence over the election of judges[22] and reduces the number of elections each county would conduct. Districts 2 (a single-member district) and 7 (a 2-member district) are the majority black districts. The overall population deviation between districts is 9.97%.

b. Leon County Court plans

The experts propose three different plans for judicial elections to the Leon County Court (Leon Plans A, B, and C).[23]

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[22] Leon County is given influence over seven judges, Gadsden, County influence over two judges, and the remaining counties influence over one judge each. *Wilson-Terrie Report* at 7.

[23] Maps of the three proposed Leon County Court plans and population data for those plans are provided as Attachment B to this order.

In Leon Plan A, the experts propose using three districts from Circuit Plans A, B, C, and E for the county court configuration. The experts base this proposal on the fact that the ideal population for the Leon County Court would be nearly identical to the ideal population for the two-seat multi-member districts that the experts have proposed.[24] The experts assert that 11 "[v]oter confusion would clearly be curtailed if the same districts are used for the circuit and county court." *Wilson-Terrie Report* at 8-9. District I is the black majority registration district, with blacks making up 56.9% of the registered voters. The overall population deviation between districts is 11.17%.

Leon Plan B is basically the same as Leon Plan A. District I under this plan is identical to the majority-black registration district in Leon Plan A. However, to lower the population deviation in Leon Plan A to below 10%, one precinct is shifted between districts 4 and 5. The overall population deviation between districts is 3.11%.

Finally, Leon Plan C raises the VAP from 49.57% under Leon Plans A and B up to a 50.1% VAP majority. District 4 has been reconfigured to the circuit court plan, and is identical to district 5 contained in Circuit Plans A-E. The overall population deviation between districts is 8.73%.

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[24] According to the plaintiffs' experts, the ideal population for the four seat Leon County Court is 48,123 people – compared to the 49,750 persons for the two seat multi-member districts. *See Wilson-Terrie Report* at 8.

2. Remedial alternatives:

a. Subdistrict elections

Dr. Engstrom offered-two principal remedial alternatives, using the subdistrict plans proposed in the *Wilson-Terrie Report*. According to Dr. Engstrom, neither one of these alternatives was discussed in the *Nipper* decision. Dr. Engstrom contended that each alternative could alleviate the dilution of black voting strength while maintaining judges, accountability to the entire, at-large electorate.

The first of these is the possibility of holding an initial, nonpartisan election from a subdistrict within the county or circuit,[25] but requiring the winner of the subdistrict election to be approved by a yes or no vote of all the voters in the circuit or county at-large, before taking office. *Engstrom Report* at ¶¶ 5-6. Dr. Engstrom stated that the system would preserve the "linkage" between a judge's jurisdiction and electoral base [*see* Fla. Stat. § 105.061] by assuring that any judicial candidate must obtain the approval of voters in the entire jurisdiction at-large. Engstrom Test., Tr. at 232. At the same time, Dr. Engstrom asserted that the system would alleviate vote dilution by permitting the candidates to run initially (at

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[25] According to plaintiffs, since nonpartisan judicial elections are already held at the same time as partisan elections for other state offices, the judicial subdistrict election could take place at the time of the first primary, with any runoff for the subdistrict taking place at the second primary, and the at-large vote for approval or disapproval of the winner of that election taking place at the time of the general election. *Engstrom Report* at ¶¶ 5-6.

the time of the first primary) from subdistricts, one or more of which could be majority black in population. *Id.* at 231.[26] Plaintiffs conclude that under this method of election, little danger would exist that a judge would exhibit favoritism toward litigants from the subdistrict, because voters in the jurisdiction at-large would be able to vote a judge out of office if such favoritism were exhibited.

Alternatively, Dr. Engstrom proposed that the subdistricts could be used to elect judges for an initial fixed term (for example, two years), with the at-large vote for approval or disapproval of the judge taking place at the end of the initial term. Judges who are approved by the at-large electorate would then serve the rest of their regular term, and thereafter would sit for normal terms (four years for county judges and six years for circuit judges). *Engstrom Report* at ¶¶ 7-8.[27]

Plaintiffs argue that under any of these remedial options, the State of Florida's interests in maintaining a

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[26] Plaintiffs assert that if a candidate were nominated from a subdistrict, but for some reason failed to win approval in the at-large approval election, the resulting vacancy could be filled in accordance with Florida's current system for filling vacancies: merit selection and gubernatorial appointment. Engstrom Test., Tr. at 233-34.

[27] Plaintiffs also represent that the State of Florida could choose a variation on this alternative: an initial subdistrict election, after which the judges elected initially from subdistricts would be subject only to at-large retention elections thereafter, at the end of their normal terms, in the same manner as is currently provided for Supreme Court Justices and District Court of Appeal judges.

residency requirement, staggered terms, a majority vote requirement, and a numbered post system would be preserved. Furthermore, plaintiffs claim that these remedial alternatives do not require any alteration in the number of judges elected or in the size of the circuit. Finally, plaintiffs represent that interim vacancies would continue to be filled using the same modified "Missouri Plan" system that now is used currently: nomination by the Judicial Nominating Commission and appointment by the Governor.

b. Alternative election systems

Dr. Engstrom also proposed two modified at-large election systems: "cumulative voting" and "limited voting." Dr. Engstrom explained these systems as follows:

> Under cumulative voting, voters are not restricted to casting only a single vote for any candidate of their choice. Voters may still be allowed to cast as many votes as there are seats to be filled in an election, but they may cumulate or aggregate their votes behind one or more candidates if they wish. For example, if three seats are to filled in an election, each voter may still be allowed to cast three votes. The voter could give one vote apiece to three different candidates, two votes to one candidate and another to a second candidate, or all three votes to one candidate (a practice known as "plumping"). The choice of how to cast the votes they have been given is left for the voter to decide. The winning candidates are determined by a simple plurality rule; the top N vote recipients are elected to the N available seats.

* * * *

> Under limited voting, the one vote per candidate of choice restriction is retained, but voters are no longer allowed to cast as many votes as there are seats to be filled in an election. In a four-seat election, for example, each voter may have only one vote to cast, or alternatively, each voter may be given two votes or three votes. The distinguishing characteristic of a limited voting system is that the number of votes each voter is allowed to cast is less than the number of seats to be filled. As with cumulative voting, winning candidates are determined by a simple plurality vote criterion.

Engstrom Report, at ¶¶ 18, 25.[28]

According to Dr. Engstrom, both of these election systems could be adopted for the Second Judicial Circuit Court and Leon County Court elections without sacrificing many features of the existing election system, including: the present geographical boundaries of the two courts; preservation of linkage between the court's jurisdiction and electoral base; nonpartisan elections;

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[28] For a more complete discussion of these electoral systems, *see generally* Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621 (1978); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L. J. 144 (1982); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993); Ronald W. Chapman, Comment, *Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elections*, 48 SMU L. REV. 457 (1995).

staggered elections in the Second Judicial Circuit[29]; and the use of appointments to fill interim vacancies. *Engstrom Report* at ¶¶ 24, 28; Engstrom Test., Tr. at 249-51. In addition, he stated that these systems satisfy the requirement of voter equality, while still giving minority voters an opportunity to elect the candidate of their choice. Furthermore, he opined that neither system places difficult demands on voters, as demonstrated by the experience of the thirty or more local governmental units that have used cumulative voting. Dr. Engstrom concluded that these systems "are certainly no less democratic, and arguably more so, than the other multi-seat election systems currently employed in this country." *Engstrom Report* at ¶ 29.

B. Analysis – Subdistrict elections:

Plaintiffs' proposed subdistrict election remedies are troublesome in two critical respects. First, the subdistricting schemes offered in the *Wilson-Terrie Report* run afoul of the Supreme Court's recent *Shaw v. Reno* ("*Shaw I*")[30] line of equal protection jurisprudence. Second, even

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[29] Dr. Engstrom stated in his report that the threshold of exclusion for the ability of minority voters to elect candidates of their choice goes up as the number of seats goes down in a given election. *Engstrom Report* at ¶¶ 22, 27. As a result, Dr. Engstrom testified that it would not be possible to maintain the use of staggered terms in the Leon County Court (where there are only four judges), and still provide minority voters with a meaningful opportunity to elect a candidate of their choice. Engstrom Test., Tr. at 248-251.

[30] 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

assuming the proposed subdistricting schemes could survive an equal-protection challenge, plaintiffs' proposed remedial alternatives [outlined in the *Engstrom Report*] would require significant changes in Florida's judicial model and otherwise undermine the administration of justice within the State, in direct contravention to *Nipper* and *SCLC*.

1. The proposed subdistricts are unconstitutional

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The *Shaw I* court noted that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." 509 U.S. at 642, 113 S. Ct. at 2824. Consequently, strict scrutiny is triggered when a redistricting or reapportionment plan is drawn for predominately race-based reasons. *E.g.*, *Shaw II*, 1996 WL 315870, at *5; *Bush v. Vera*, 1996 WL 315857, at *5; *Miller v. Johnson*, 515 U.S. ___, 115 S. Ct. 2475, 2481, 2490, 132 L. Ed. 2d 762 (1995), *on remand*, 922 F. Supp. 1556 (S.D. Ga. 1995), *probable jurisdiction noted*, 116 S. Ct. 1823 (1996); *Shaw I*, 509 U.S. at 644-48, 113 S. Ct. at 2825-27.

In order to determine whether "race [is] the predominant factor motivating the . . . decision to place a significant number of voters within or without a particular district," there must be proof that traditional race-neutral districting principles [such as geographical compactness,

contiguity, respect for political subdivisions[31]] were subordinated to racial considerations. *Miller*, 515 U.S. at ___, 115 S. Ct. at 2488. Proof of such racial motives may be shown through either circumstantial evidence, such as the district's shape and demographics, or more direct evidence of the purpose. *Id.* If a district has been racially gerrymandered, it will only survive if it is narrowly tailored to achieve a compelling interest. *Id.* at ___, 115 S. Ct. at 2490; *Shaw I*, 509 U.S. at 644-48, 113 S. Ct. at 2825-27.

It is undoubtedly true that plaintiffs' experts were aware of "traditional race neutral districting techniques in drafting the alternative [sub-districting] plans." *Wilson-Terrie Report* at 2. On the other hand, it is equally clear that those interests were subordinated to race wherever necessary to draw majority-black subdistricts in rough proportion to the black population within the Second Judicial Circuit and Leon County. Dr. Terrie admitted as much in his testimony, stating that it was his charge to draw black majority subdistricts in the two "nucleuses within the circuit . . . in which black voters tend to be concentrated"; namely, in Gadsden County and in Tallahassee (encompassing French Town and Florida A & M University). Terrie Test., Tr. at 104, 119-30, 140-46. Using maps and population data obtained from census results, plaintiffs' expert demographers redrew the lines of the two courts along racial lines. It is also not insignificant that the *Wilson-Terrie Report* does not elaborate on traditional (non-racial) districting principles in any precise

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[31] *Shaw I*, 509 U.S. at 647, 113 S. Ct. at 2827.

detail.[32] Consequently, the subdistricts proposed in the *Wilson-Terrie Report* are subject to strict scrutiny.

To satisfy strict scrutiny, a race-based redistricting plan must be narrowly tailored to achieve a compelling interest. *E.g., Miller*, 515 U.S. at ___, 115 S. Ct. at 2490. The

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[32] *Compare with Reed v. Town of Babylon*, 914 F. Supp. 843, 871-74 (E.D.N.Y. 1996), where the court applied *Shaw* to a proposed Section 2 remedial plan and concluded plaintiffs failed to meet the first *Gingles* precondition [geographical compactness] because they did not "give any regard to key districting criteria in drawing their plan." *Id.* at 872. The *Reed* court further noted:

> Plaintiffs need not produce the ideal districting plan in order to satisfy the first prong of *Gingles*, yet, they should have done more than draw a plan based almost exclusively on racial considerations with no concern for key districting criteria. At the very least, they should have made an effort to assure the Court through discussion of the Town's topography, political subdivisions, communities and electoral districts that the plan did, or could be adjusted to conform, with traditional districting criteria. Plaintiffs' plan and accompanying explanations gave the Court no confidence that it could "fashion a remedy for a demonstrated abridgement" of Section 2. Furnishing the Court with such confidence is the essence of the first prong of the *Gingles* analysis. In light of *Miller* and *Shaw*, it would be questionable, at best, whether plaintiffs' plan, devised with so little attention to traditional districting criteria and with race the near-sole consideration, could be adopted by the Court as a remedy, were a Section 2 violation to be found, and survive strict scrutiny in an Equal Protection clause challenge.

Id. (quoting *Nipper*, 39 F.3d at 1510-11) (other internal citations omitted).

Supreme Court has assumed, without deciding, that compliance with the "results test" in Section 2 can be a compelling state interest. *Bush v. Vera*, 1996 WL 315857, at *15 (collecting citations). Nevertheless, as Justice O'Connor noted in her plurality opinion in *Bush*, the state must still have a "strong basis in evidence" for finding that the threshold conditions for Section 2 liability are present to justify the intentional creation of a majority-minority district. *Id.* at *16. *Accord Johnson v. Mortham*, 1996 WL 189235, at *3 (assuming that compliance with the Voting Rights Act is a compelling state interest "if, and to the extent, there is a 'strong basis in evidence' that remedial action is required to avoid violating federal law). In addition, the majority-minority districts must be narrowly tailored in the manner most likely to "substantially address, if not achieve, the avowed purpose" of eliminating any existing vote dilution. *Shaw II*, 1996 WL 315870, at *9 (collecting citations).

As will be discussed in greater detail in Section II(B)(2), *infra*, the Court finds that plaintiffs have failed to prove a Section 2 violation. Thus, plaintiffs lack a compelling interest pursuant to Section 2 of the Voting Rights Act. Moreover, even if there were a compelling interest in complying with Section 2, the extent to which plaintiffs engage in racial gerrymandering to draw the subdistricts is not narrowly tailored to further that interest.[33]

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[33] Plaintiffs argue that their plans are narrowly tailored because they do not maximize black voter strength. To support this conclusion, plaintiffs point to their alternative election districts, which are drawn (for comparative purposes to their proposed plans) at the block level without regard to precinct, municipal, or county boundaries. *See Wilson-Terrie Report.*

In sum, plaintiffs apparently ask the Court to achieve nearly proportional representation through the adoption of a race-based subdistrict scheme with majority-black subdistricts in both the Second Judicial Circuit and Leon County Courts.[34] Regardless of how laudable the aspirational goal of proportional representation may be, it cannot be pursued in the manner that plaintiffs propose to the Court. *Cf. White v. State of Alabama*, 74 F.3d 1058, 1073 (11th Cir. 1996) (holding that a settlement which resulted

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Nevertheless, the mere fact that plaintiffs do not seek maximization of the number of judicial elections in which blacks may elect the candidates of their choice, does not, *ipso facto*, mean that their proposed remedies are the most narrowly tailored remedies available.

[34] One of plaintiffs' experts, Dr. Lichtman, expressed the view that a minimum of three black judges out of fifteen total judges (between the eleven judges on the Second Judicial Circuit Court and the four judges on the Leon County Court) are necessary for Voting Rights Act compliance. Lichtman Test., Tr. at 84-85.

Plaintiffs' other experts were not as direct as Dr. Lichtman in stating that any remedy adopted would have to approach proportional representation. Nevertheless, in their proffered remedial plans, plaintiffs would have the Court condone the use of majority or near-majority black subdistricts to give black voters in the Second Judicial Circuit and Leon County the ability to elect at least three circuit judges and one county court judge. Within the Second Judicial Circuit, Blacks comprise 28.9% of the total population, 26.1% of the VAP, and 25.1% of registered voters; three judges equates to 27.3% of the eleven circuit court judges, approximately the same as the percentage of blacks within the circuit. In Leon County, blacks comprise 24.2% of the total population, 22.2% of the VAP, and 21.8% of registered voters; one judge equates to 25% of the four county court judges, greater than the percentage of blacks within the county. *See Wilson-Terrie Report*.

in an increase in the number of appellate court judges and creation of a nominating committee to ensure proportional representation of black voters was foreclosed by the Voting Rights Act as a remedy). The Voting Rights Act does not require proportional representation[35] or even particular types of districts – just an election scheme that does not "result in unequal access to the political process." *Voinovich v. Quilter*, 507 U.S. 146, 155, 113 S. Ct. 1149, 1156, 122 L. Ed. 2d 500 (1993). To hold otherwise, and venture down the race-based path suggested by plaintiffs in their remedial plans, would require taking "a shortsighted and unauthorized view of the Voting Rights Act . . . [by demanding] the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 515 U.S. at ___, 113 S. Ct. at 2494. *See also Johnson v. Mortham*, 1996 WL 189235, at *25 (" 'Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions' that strike at the very heart of achieving a color-blind society.") (quoting *Shaw I*, 509 U.S. at 657, 113 S. Ct. at 2832). The Court respectfully declines to take this path.

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[35] In fact, the plain language of Section 2 expressly disavows any right to proportional representation. That language, contained in what is known as the "proportional representation clause" or Dole Amendment to Section 2, provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

2. The proposed remedial alternatives violate *Nipper* and *SCLC:*

Plaintiffs, through Dr. Engstrom, have proposed two subdistricting remedies: a subdistrict competitive nomination election followed by a jurisdiction-wide approval vote, and a subdistrict competitive election followed by a jurisdiction-wide retention vote. There is no subdistrict residency requirement under either proposal. Although each of these remedies would give black voters the opportunity to elect candidates of their choice in the subject jurisdictions, they nevertheless cannot be implemented "within the confines of the state's judicial model." *Nipper,* 39 F.3d at 1531. Moreover, use of plaintiffs' remedies would substantially "undermine the administration of justice." *Id.* at 1531. As a result, plaintiffs have failed to demonstrate a cognizable claim of vote dilution.

a. Plaintiffs' remedies require alteration in the size and nature of the challenged judicial structure

The first *Gingles* precondition to stating a claim of vote dilution requires the minority group to demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single member district." 478 U.S. at 50, 106 S. Ct. at 2766. At the initial trial of this cause, the Court held that plaintiffs had satisfied this precondition by showing that three black majority VAP subdistricts could be drawn in the challenged jurisdictions. *See Findings* at 9-10. However, intervening case law has demonstrated that this was an erroneous holding.

In *Holder v. Hall*, the Supreme Court held that plaintiffs cannot maintain a vote dilution challenge to the numerical size of a government body because there is no "objective and workable standard for choosing a benchmark by which to evaluate" that challenged voting practice. ___ U.S. at ___, 114 S. Ct. at 2586.[36] In *Concerned Citizens for Equality v. McDonald*, 63 F.3d 413 (5th Cir. 1995), a Section 2 challenge to the system for electing Constables and Justices of the Peace in Orange County, Texas, the Fifth Circuit elaborated on *Holder's* impact on the geographical compactness requirement:

> In a § 2 vote dilution claim, grounded in the numerical size of a governmental body, the plaintiff cannot beg the first prong of *Gingles*. In other words, when the existing size of the governmental body precludes a plaintiff from satisfying the first prong of *Gingles*, that *plaintiff may not invoke hypothetical mutations and transfigurations of the existing political structure to circumvent that Gingles prerequisite*. Such a use of hypotheticals would nullify the first prong, for whenever the first *Gingles* prong presented a problem, a plaintiff would only need to hypothesize some other political structure under which the first *Gingles* precondition would be met. The preconditions set forth in *Gingles* are necessary: *Voting rights plaintiffs may not employ a self-serving*

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[36] *See also id.* at ___, 114 S. Ct. at 2590 (O'Connor, J., concurring) ("In a dilution challenge to the size of a governing authority, choosing the alternative for comparison – a hypothetical larger (or smaller) governing authority – is extremely problematic. The wide range of possibilities makes the choice inherently standardless.").

> *thought experiment to leapfrog one of the "necessary" Gingles preconditions.*

Id. at 417 (emphasis added).[37] The Eleventh Circuit has apparently subscribed to the *McDonald* court's reasoning. *See generally Nipper*, 39 F.3d at 1532 & n.75 (holding that "federal courts may not mandate as a section 2 remedy that a state or political subdivision alter the size of its elected bodies," and the resulting absence of any remedy "within the confines of the state's judicial model" would foreclose section 2 liability).

In the case at bar, the sizes of the governing bodies are eleven circuit judges elected *circuitwide* and four county judges elected *countywide*. However, each of plaintiffs' proffered plans relies upon significant alterations in the size and corresponding electoral base of the Second Judicial Circuit, through the use of subdistricts for initial elections.[38] Specifically, plaintiffs propose changing the existing judicial model calling for at-large judicial elections, and replacing it with single and multi-member subdistricts in which only those residing therein would

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[37] In *McDonald*, the plaintiffs maintained that while blacks did not constitute a majority in any of a county's single-member precincts (districts), a fifth majority black precinct could be created and thereby satisfy *Gingles*. 63 F.3d at 416. The Fifth Circuit rejected the plaintiffs' argument on the basis of *Holder*. *Id.* at 416-18. In so holding, the *McDonald* court declined to accept the plaintiffs' assertion that a provision of the Texas Constitution providing for the addition of single-member precincts "for the convenience of the people" was a benchmark sufficient to satisfy *Holder*. *Id.* at 418.

[38] This is not surprising, since blacks do not comprise a majority of the population in either the Second Judicial Circuit or Leon County.

initially elect a judge. Non-subdistrict voters would be limited solely to the roles of either giving subsequent approval (or disapproval) in elections held after a judge's initial term of office, or to voting for or against retention. Nonetheless, neither the proposed subdistricts nor the plaintiffs' election schemes has any basis in Florida law.

Article V, Section 9 of the Florida Constitution requires that either the Supreme Court of Florida or the Florida Legislature increase, decrease, or redefine judicial circuits. If the Court were to find that the State of Florida had to adopt some sort of subdistricting scheme for the subject jurisdictions, it would necessarily have to disregard this constitutional provision – unless the State of Florida amended it. Plaintiffs' argument that this Court would not actually be changing the size of the judicial districts because the State of Florida would ultimately have the final authority to select one of the plaintiffs' remedial plans, is incorrect. Presumably any remedial plan mandated by the Court's finding of Section 2 liability would necessarily limit the State defendants to the plaintiffs' subdistricting plans or their equivalent. Under such circumstances, the freedom to choose from several subdistricting schemes that are wholly alien to Florida law (in order to comply with the Court's mandate), can hardly be said to be a meaningful choice at all.

Furthermore, Article V, Section 10 of the Florida Constitution dictates that circuit judges and county judges be elected "by a vote of the qualified electors within the territorial jurisdiction of their respective courts." Since the only candidate-competitive election in plaintiffs' proposed plans would take place within a subdistrict, this constitutional provision would also have to be amended.

Plaintiffs' assertion to the contrary – namely, because all voters within the Second Judicial Circuit or Leon County would have a final voice through either approval or retention votes – is simply inconsistent with both Florida law and the evidence presented in this case.[39] Under Florida Law, there is a difference between an "election" and "retention" for judicial office. *See* Fla. Stat. § 105.011(2); Travis Test., Tr. at 205-06. Plaintiffs would only give voters residing outside the subdistrict the ability to participate in the latter, and not the former, even though Florida law provides for qualified electors of the court's jurisdiction to participate in both. *See* Fla. Stat. § 105.061. *See also* Fla. Stat. § 105.051 (providing the method by which candidates for circuit or county judge are nominated and elected to office through the numbered place and majority vote requirements). Moreover, in election systems limiting non-subdistrict voters to a right to vote for or against retention or for jurisdiction-wide approval or disapproval after an initial election, the powerful effect of incumbency in judicial elections would render that right virtually worthless. *See Supp. Stip.* at ¶¶ 16-42 (showing that on the more than forty occasions

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[39] The irony of plaintiffs' proposed schemes are that a judicial candidate not residing in the subdistrict ("non-resident candidate") would be unable to vote for himself or herself. Similarly, his or her family and neighborhood friends and associates, including non-resident colleagues, would be incapable of voting in the competitive election for the candidate of their choice. Instead, all of these individuals would be restricted to participation in the non-resident candidate's approval or retention. Of course, this electoral participation will not even exist if the non-resident candidate never makes it past the initial competitive election held in the subdistrict.

over the past thirty years in which circuit and county judges have had to run as incumbents, only a handful faced opposition, and only one was defeated). In the absence of constitutional change, forcing the State to accept one of plaintiffs' election systems would be akin to compelling the state to disenfranchise every voter residing in the two jurisdictions, but outside the subdistrict.

Other constitutional and statutory changes would also be required through the use of a retention or approval system. Article V, Section 10 of the Florida Constitution and Florida Statutes Sections 105.051 and 105.061 specifically refer to retention as being applicable to justices of the Florida Supreme Court or judges of a district court of appeal – not circuit or county court judges. As a result, to accomplish what plaintiffs propose, these provisions would have to be modified to reflect the change from a jurisdiction-wide competitive election to a subdistrict election and subsequent jurisdiction-wide approval and/or merit retention votes. Florida's Article V Task Force recognized as much in its consideration of ways to enhance minority representation on the bench. *See* FLORIDA'S ARTICLE V TASK FORCE, FINAL REPORT (1995) (Doc. 261). *See also* Buzzett Test., Tr. at 193-96 (testifying about Task Force's proposed changes to Florida Constitution and statutes).

Finally, as may be seen by reviewing the preceding paragraphs, statutory changes would also have to be made with regard to Florida's numbered place system and majority vote requirement. *See* Fla. Stat. § 105.051.

In conclusion, the foregoing discussion has shown that a substantial number of changes in Florida law

would be required to alter the size of the challenged jurisdictions and to impose the election schemes advanced by plaintiffs.[40] Plaintiffs have failed to demonstrate the existence of any benchmark within the state's judicial model to serve as a basis for their remedial plans. As a result, under the authority of *Holder, McDonald,* and *Nipper,* plaintiffs have failed to meet the first *Gingles* precondition of geographical compactness, as informed by the demonstration of a remedy existing within the State of Florida's judicial scheme.

b. Plaintiffs' remedies will destroy the linkage between a judge's jurisdiction and electoral base

In the context of reconfiguration of the Second Judicial Circuit, plaintiffs' subdistricting plan directly implicates the state's linkage interest. Linking a trial court judge's territorial jurisdiction to one's electoral base serves to preserve judicial accountability, while still maintaining judicial independence. *SCLC,* 56 F.3d 1297. A state's interest in this linkage is heightened where, as here, there is no evidence that justice in the challenged courts' structure is being administered in a racially discriminatory manner. *See SCLC,* 56 F.3d at 1295; *Nipper,* 39 F.3d at 1544 (Tjoflat, plurality opinion).

As discussed in section II(B)(2)(a), *supra,* an approval or retention vote, as proposed by plaintiffs in their subdistrict plans, is not an election. The Eleventh Circuit

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[40] Two of plaintiffs' own witnesses also concurred in this assessment. *See* Travis Test., Tr. at 208; Engstrom Test., Tr. at 266.

discussed the problems of using of subdistricts in the context of the linkage requirement, as follows:

> The Alabama model reflects a belief that voters should have the right to hold a judge accountable for his or her performance. Subdistricting, however, would strip every voter residing beyond a judge's subdistrict of his or her participation in the judicial selection process – leaving the judge accountable only to those voters in his or her subdistrict. Even in the judge's own subdistrict, voters would be disenfranchised: In white subdistricts, the voting power of blacks would be diluted; in black subdistricts the voting power of whites would be diluted. The likely effects of the loss of minority influence would be more pronounced in this context of a lone decisionmaker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction.

SCLC, 56 F.3d at 1297. Therefore, in light of controlling case law and the facts of this case, it is obvious that plaintiffs' proposed subdistrict election schemes break the linkage between the judge's jurisdiction and electoral base.

Plaintiffs argue that notwithstanding the failure to maintain linkage under their proposed remedies, that omission should be overlooked because Florida does not always enforce linkage under the existing judicial system. Plaintiffs point to the system of assigning county judges to sit as circuit judges as evidence of this fact. In fact, it is true that the State of Florida has refused to faithfully maintain the linkage requirement by recognizing the

necessity of temporary appointments to the administration of justice in the state:

> Article V, section 2(b) of the Florida Constitution permits county judges who are qualified to serve on the circuit court to be assigned temporarily to hear matters within the jurisdiction of the circuit courts. Such assignments are often necessary and indeed, critical to the effective management of caseloads in many circuits.

In re Certification of Judgeships, 611 So. 2d 1244, 1247 (Fla. 1993). It is likewise accurate that in the Second Judicial Circuit, this has resulted in a judge elected by one subunit of the Second Judicial Circuit (a county) exercising jurisdiction over circuit court cases, regardless of the fact that voters in the Second Circuit at-large could not hold that judge electorally accountable. *See, e.g.*, Pls.' Ex. 16.

However, what plaintiffs fail to recognize is that these exceptions to the linkage requirement are all expressly provided for under Florida law. *See* Fla. Const. art. V, §§ 2(b), 8; Fla. Stat. § 26.57. Furthermore, these exceptions are just that: *exceptions* to the general rule of linkage. Under plaintiffs' flawed logic, the exceptions would swallow the rule, removing any semblance of linkage between judges and voters residing outside the judge's subdistrict. The Court must also assume that the Eleventh Circuit implicitly rejected plaintiffs' argument in *Nipper*, where the court found that Florida's interest in preserving linkage outweighed all of the plaintiffs' proposed remedies (including subdistricts). *See Nipper*, 39 F.3d at 1542 (Tjoflat, plurality opinion); *id.* at 1547 (Edmondson, concurring). *See also SCLC*, 56 F.3d at

1296-97 (finding that subdistrict elections would destroy Alabama's linkage requirement).

c. Plaintiffs' remedies will "undermine the administration of justice" in the challenged jurisdictions

Nipper made it clear that any system designed to remedy vote dilution in a judicial model must not "undermine the administration of justice" in that model. 39 F.3d at 1531. In the case sub judice, to accomplish plaintiffs' stated purpose this Court will be required to compel the State of Florida to "alter[ ] the current electoral schemes for the express purpose of electing more black judges, [thereby] proclaiming that race matters in the administration of justice." *Id.* at 1546 (Tjoflat, plurality opinion). Plaintiffs (and, indeed, this Court) have been unable to identify any means to avoid the remedial quandary of using race-based subdistricts, which Chief Judge Tjoflat's articulated as follows:

> The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal. In the eyes of the public and litigants, at least, justice would not remain colorblind.

Id. Plaintiffs' remedies therefore fail to comply with this essential requirement under *Nipper.*

d. Florida's interest in maintaining the challenged election systems outweighs any vote dilution that may exist

The state's interest in maintaining the challenged electoral system for its judges is a legitimate factor to be considered when determining liability under Section 2. *Nipper*, 39 F.3d at 1529 (citing *Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. 419, 426-27, 111 S. Ct. 2376, 2380-81, 115 L. Ed. 2d 379 (1991)). In this case, three considerations weigh very heavily in favor of allowing the State to maintain the challenged systems. First, plaintiffs' remedies would require this Court to engage in unparalleled, wholesale revisions of some of the most important foundations of Florida's judicial structure. Second, making these revisions would result in many of the very evils that Florida's judicial model, and indeed, Section 2 itself, were designed to avoid: lack of accountability and further division of voters in judicial districts along racial lines. Third, adoption of plaintiffs' proposed remedies would create the unusual circumstance of having judges in the Second Judicial Circuit and Leon County Courts selected in a manner inconsistent with every other circuit and county court in the State of Florida. Consequently, the Court must necessarily conclude, as a matter of law, that Florida's interest in maintaining the challenged judicial structures outweighs any vote dilution that may exist in this case.

e. Summary

The *Nipper* and *SCLC* courts have already considered and rejected the use of subdistricting in connection with

remedying vote dilution in judicial elections. In both cases, the Eleventh Circuit found that use of subdistricting would accomplish the following: disenfranchise all voters residing beyond a judge's subdistrict, and those voters who are in the minority within the subdistrict; make the race of the constituents the deciding factor in determining the judicial candidate elected, thereby undermining the fair and impartial administration of justice; break the linkage between the candidate and his or her electoral constituency; encourage "home cooking" by making it more likely that a judge will favor the constituents of his or her smaller electorate; and declare that race matters in the judicial selection process. *See SCLC*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1543-45 (Tjoflat, plurality opinion). In the case at bar, Plaintiffs have engaged in a futile attempt to correct these shortcomings of race-based subdistricts.

2. Alternative election systems

The Court also rejects each of plaintiffs' modified at-large election systems (e.g., cumulative voting and limited voting). Neither one of these voting systems is presently employed in Florida's judicial selection process. In addition, such voting systems would effectively eviscerate the use of a numbered-place system in Florida's judicial election scheme. *See* Fla. Stat. ch. 105. To the extent that plaintiffs suggested that a simple plurality (instead of a majority vote) be imposed in concert with these alternative election schemes, Florida law would also have to be changed. *See* Fla. Stat. § 105.051(1). Use of both election systems would also encourage, rather than

discourage, racial bloc voting – the very thing that Section 2 was designed in part to eliminate. These concerns were recognized by at least some of the circuit judges in *Nipper* [*see* 39 F.3d at 1545-46] and the parties in *SCLC* [*see* 56 F.3d at 1296 n.24]. Therefore, the Court expressly finds that both of these alternative systems do not exist "within the confines of the state's judicial model" and that they would otherwise "undermine the administration of justice." *Nipper*, 39 F.3d at 1531.[41]

C. Conclusion

Since the court initially found that plaintiffs had established Section 2 liability [*see Findings*], it has been troubled by the issue of what remedy (if any) could be imposed. Specifically, the Court was concerned that any

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[41] The Court is also cognizant of the fact that the Fifth Circuit has rejected the use of limited or cumulative voting systems to remedy any defects in an at-large system for electing judicial officers. *See League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc) ("*LULAC II*"), *cert. denied*, ___ U.S. ___, 114 S. Ct. 878, 127 L. Ed. 2d 74 (1994), wherein the Fifth Circuit noted,

> Limited and cumulative voting are election mechanisms that preserve at-large elections. Thus, they are not "remedies" for the particular structural problem that the plaintiffs have chosen to attack. . . . Plaintiffs cannot attack at-large voting as a violation of § 2, and then ignore the special characteristics of the judicial office by insisting that they will embrace a remedy that preserves that scheme. To do so would completely shunt consideration of the interest to the remedy stage, contrary to *Houston Lawyers'*.

Id. at 876.

workable remedy for vote dilution in judicial elections would necessarily require re-writing or eliminating significant portions of the Florida Constitution and Statutes – something which this Court, out of respect for the principle of federalism, was loathe, and indeed, constitutionally incapable of doing. In addition, even if such changes were possible, the Court believed that they would undermine the administration of justice in the State of Florida. As the foregoing analysis of plaintiffs' proposed remedies suggests, the Court's misgivings were well-founded.

The Court need not reach the issue of whether the State of Florida's "interest in and right to formulate its own judicial system" always outweighs any minority vote-dilution that is shown – a position apparently advocated by Judge Edmondson in *Nipper* [*see* 39 F.3d at 1547 (Edmondson, concurring, in which Judges Cox, Birch, and Dubina joined)] and *SCLC* [*see* 56 F.3d at 1297-98 (Edmondson, concurring)].[42] *See generally Houston Lawyers' Ass'n v. Attorney General*, 501 U.S. at 427, 111 S. Ct. at 2381 (a state's interest in maintaining an electoral system

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[42] The State defendants made a similar argument in the instant case. *See* Docs. 215, 224 & 226.

In *Nipper*, Chief Judge Tjoflat did not argue that Florida's interest in maintaining its judicial scheme always outweighs any finding of vote dilution. Nonetheless, he noted that Florida has "emphatically abandoned" its past history of discrimination, and reasoned that "*any* districting remedy imposed by the district court would, by its very nature, alter this course and encourage greater 'responsiveness' of judges to the special interests of the people who elected them." *Nipper*, 39 F.3d at 1544 (Tjoflat, C.J., plurality opinion) (emphasis added).

"does not automatically, and in every case, outweigh proof of racial vote dilution"). Rather, the Court merely finds that under the particular facts of the case at bar, plaintiffs have failed to establish the existence of a remedy. As a result, the Court is precluded from finding that Section 2 vote-dilution liability has been established [*see Nipper*, 39 F.3d at 1530-31], mandating entry of judgment for the State defendants.[43]

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Pursuant to Federal Rule of Evidence 201, the Court GRANTS the following requests for judicial notice[44]:

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[43] This holding is not inconsistent with the analysis in the order setting this cause for a retrial, wherein the Court noted:

> In *Marbury v. Madison*, 1 Cranch 137, 162-63, 2 L.Ed. 60 (1803), Chief Justice Marshall invoked Blackstone, who had noted that it is a fundamental principle of law that "every right, when withheld, must have a remedy, and every injury its proper redress." W. Blackstone, 3 **Commentaries** 23, 109. Accordingly, if a person can challenge a judicial scheme under § 2, then they must have some form of relief available if they are successful.

Doc. 228 at 18 n.13. Plaintiffs have simply been unsuccessful in challenging the judicial schemes in question because they have failed to comply with the strict dictates of *Nipper* and *SCLC*. Consequently, there has been no showing of Section 2 liability, and there is therefore no wrong to remedy.

[44] At the retrial of this cause, the Court ruled on each of these requests for judicial notice. The Court now merely memorializes its earlier rulings from the bench.

a. Defendants' third request (Doc. 237), for judicial notice of elections data contained in Defs.' Exs. C through K, L and N;

b. Defendants' fourth request (Doc. 243), for judicial notice of elections data contained in Defs.' Exs. R, S, and T[45];

c. Defendants' fifth request (Doc. 252), for judicial notice of the Florida Education Funds' annual report on Minority participation in Legal Education Program (MPLE);

d. Defendants' sixth request (Doc. 255), for notice of judicial appointments in Florida;

e. Defendants' seventh request (Doc. 259), for judicial notice of commissions of the Honorable Richard L. Hood, Gadsden County Court judge; and

f. Defendants' eighth request (Doc. 261), for judicial notice of the Final Report of Florida's Article V Task Force.

2. Plaintiffs' motion to enjoin and to adopt a remedial plan (Doc. 193) is DENIED.

3. The Court finds as a matter of law that plaintiffs have failed to prove their claim of vote dilution under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended.

4. The clerk is directed to enter judgment for defendants against the plaintiffs, and close this case.

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[45] At the re-trial of this matter, Defendants withdrew Defs.' Ex. U, to which Plaintiffs had objected.

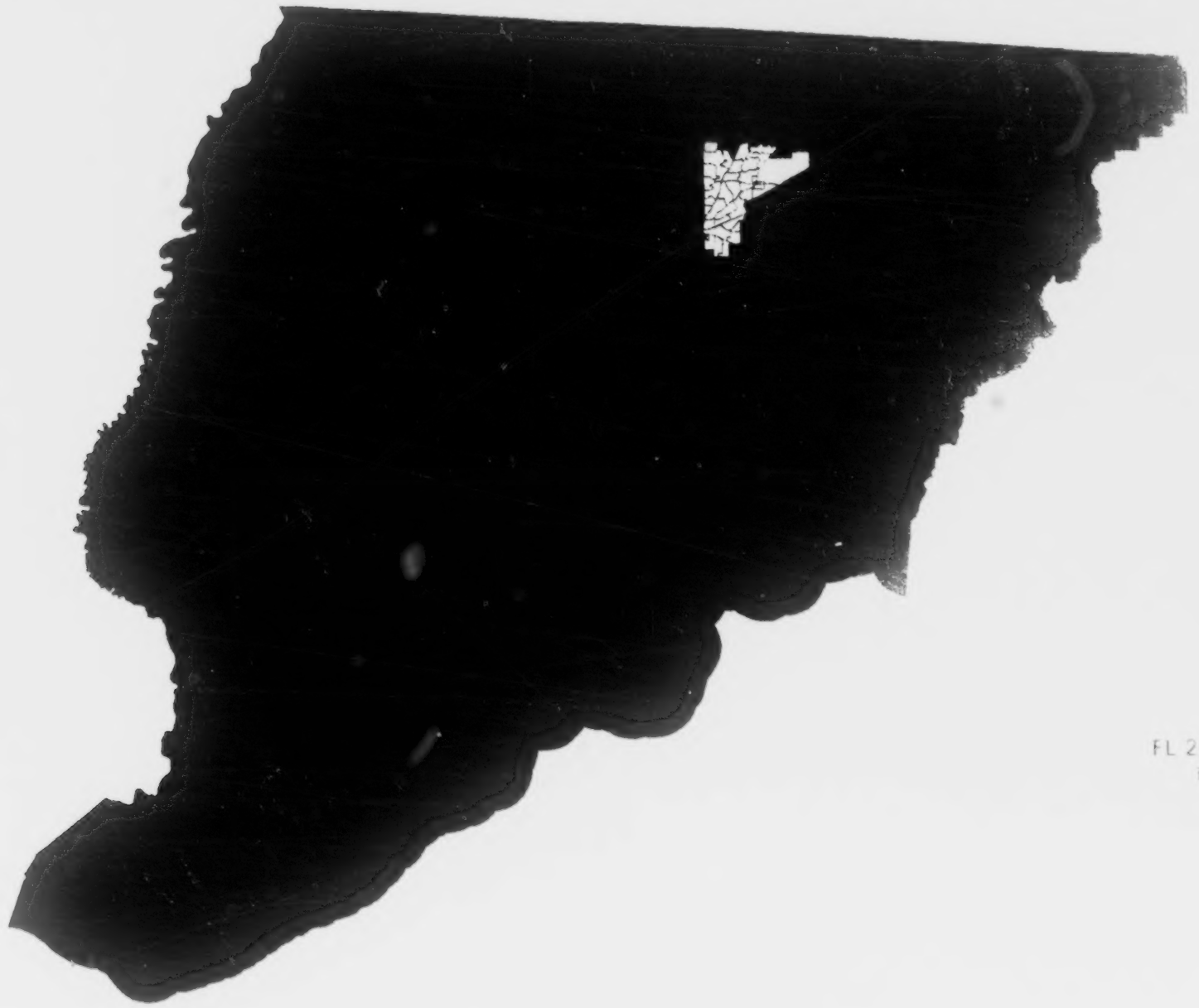
DONE AND ORDERED this 21st day of July, 1996.

/s/ Maurice M. Paul
MAURICE M. PAUL,
CHIEF JUDGE

Attachment A

Plaintiffs' Circuit Court Plans

Plan A
Florida 2nd Judicial Circuit Election Districts
5 (2 member) & 1 (single member) Districts



Jerry Wilson Esq
E. Walter Terrie, Ph.D
September, 1995

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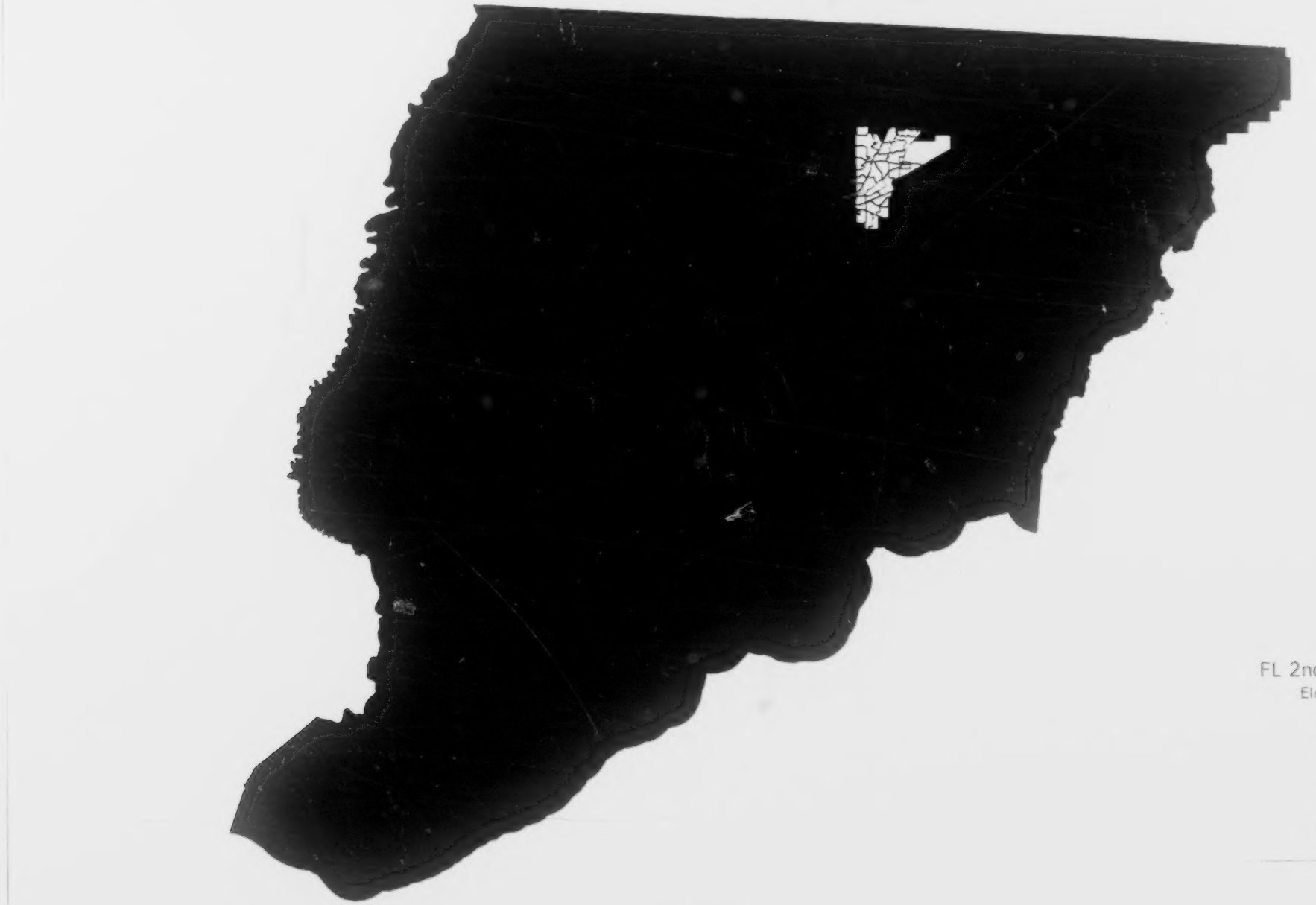
Plan A [5(2 member) 1(1 member) districts]

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	2	49,631	40,863	8,256	16.63%	36,882	30,751	5,740	15.56%	30,683	26,418	4,052	13.21%	-0.24%
2	1	25,106	7,596	16,920	67.39%	16,872	5,963	10,529	62.41%	13,573	4,630	8,837	65.11%	0.93%
3	2	51,500	41,666	8,606	16.71%	40,908	33,921	6,043	14.77%	30,747	24,433	5,341	17.37%	3.51%
4	2	51,567	35,995	14,962	29.01%	37,319	26,880	10,013	26.83%	36,185	27,707	7,910	21.86%	3.65%
5	2	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	1.59%
6	2	45,286	18,592	25,316	55.90%	36,159	16,902	18,105	50.07%	21,377	8,222	12,435	58.17%	-8.98%
7														
8														
9														
10														
11														
Total	11	273,632	189,242	79,055	28.89%	207,554	149,404	54,140	26.08%	169,491	123,548	42,483	25.07%	12.62%

Plan B
Florida 2nd Judicial Circuit Election Districts
5 (2 member) & 1 (single member) Districts



Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
September, 1995

Plan B [5(2 member) 1(1 member) districts]

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	2	49,631	40,863	8,256	16.63%	36,882	30,751	5,740	15.56%	30,683	26,418	4,052	13.21%	-0.24%
2	1	25,106	7,596	16,920	67.39%	16,872	5,963	10,529	62.41%	13,573	4,630	8,837	65.11%	0.93%
3	2	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	-1.23%
4	2	51,567	35,995	14,962	29.01%	37,319	26,880	10,013	26.83%	36,185	27,707	7,910	21.86%	3.65%
5	2	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	1.59%
6	2	47,649	19,860	26,366	55.33%	38,056	18,006	18,863	49.57%	22,640	9,010	12,883	56.90%	-4.23%
7														
8														
9														
10														
11														
Total	11	273,632	189,242	79,055	28.89%	207,554	149,404	54,140	26.08%	169,491	123,548	42,483	25.07%	7.88%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Sep. 1995)

Plan C
Florida 2nd Judicial Circuit Election Districts
5 (2 member) & 1 (single member) Districts

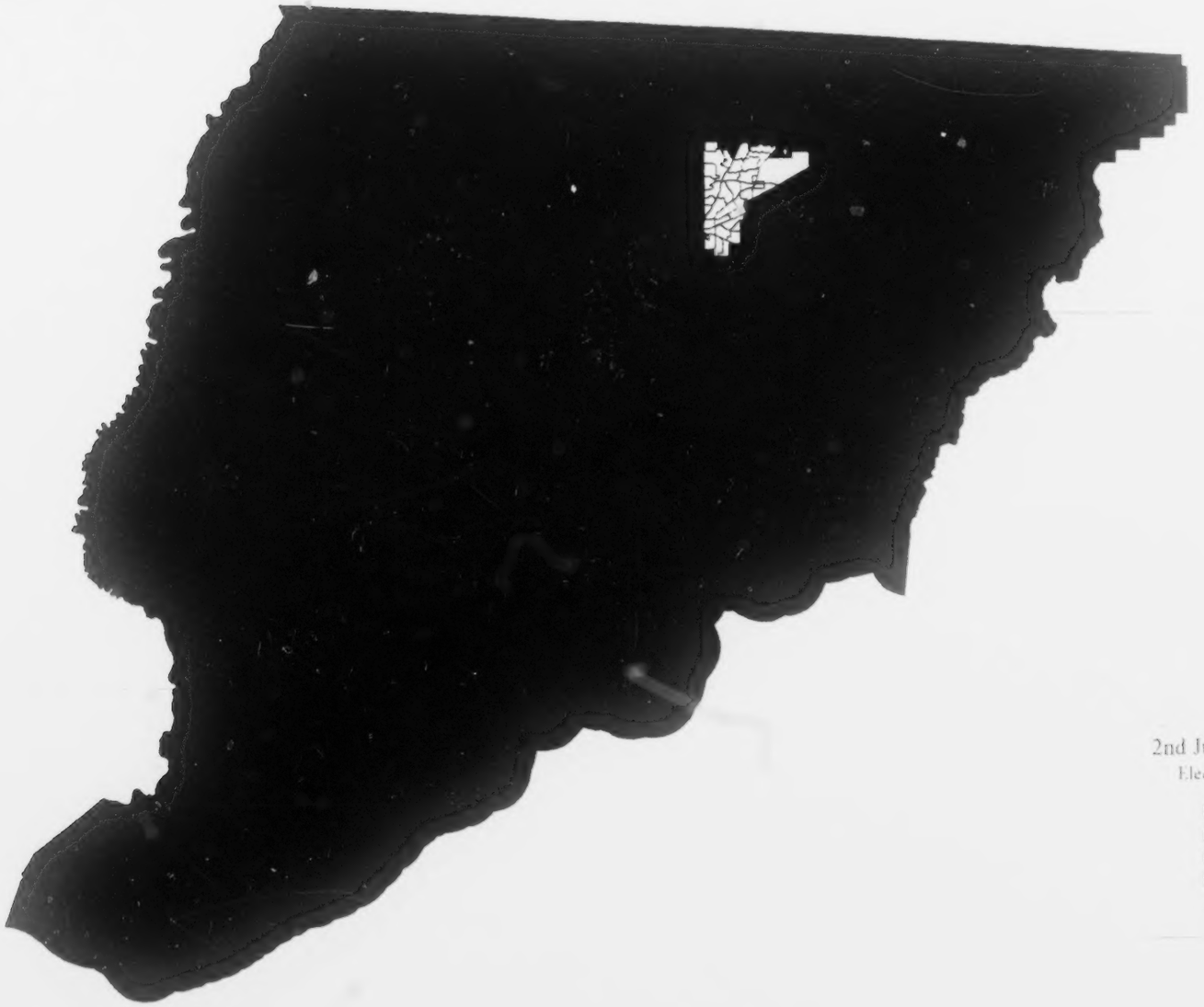
Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
September, 1995

Plan C [5(2 member) 1(1 member) districts]

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	2	51,141	42,908	7,620	14.90%	37,915	32,229	5,232	13.80%	33,035	28,415	4,293	13.00%	2.79%
2	1	24,218	8,088	15,530	64.13%	16,890	6,544	9,945	58.88%	11,637	4,192	7,343	63.10%	-2.64%
3	2	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	-1.23%
4	2	50,945	33,458	16,988	33.35%	36,268	24,821	11,105	30.62%	35,769	26,148	9,163	25.62%	2.40%
5	2	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	1.59%
6	2	47,649	19,860	26,366	55.33%	38,056	18,006	18,863	49.57%	22,640	9,010	12,883	56.90%	-4.23%
7														
8														
9														
10														
11														
Total	11	273,632	189,242	79,055	28.89%	207,554	149,404	54,140	26.08%	169,491	123,548	42,483	25.07%	7.02%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Oct. 1995)

Plan D
Florida 2nd Judicial Circuit Election Districts
4 (2 member) & 1 (3 member) Districts



Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
September, 1995

Plan D [4(2 member) 1(3 member) districts]

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	3	76,334	61,160	14,296	18.73%	55,504	45,391	9,493	17.10%	52,904	43,976	8,323	15.73%	2.29%
2	2	45,958	19,757	25,413	55.30%	32,641	15,605	16,494	50.53%	25,181	12,642	12,302	48.85%	-7.62%
3	2	50,155	41,389	7,656	15.26%	39,039	32,946	5,264	13.48%	29,848	24,230	4,753	15.92%	0.81%
4	2	50,643	22,406	26,695	52.71%	40,956	20,475	19,179	46.83%	24,632	10,562	13,197	53.58%	1.79%
5	2	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	1.59%
6														
7														
8														
9														
10														
11														
Total	11	273,632	189,242	79,055	28.89%	207,554	149,404	54,140	26.08%	169,491	123,548	42,483	25.07%	9.91%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Sep. 1995)

PLAN E

Florida 2nd Judicial Circuit Election Districts
3 (2 member) & 5 (single member) Districts

Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
September, 1995

Plan E [3(2 member) 5(1 member) districts]

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	1	24,836	21,272	3,311	13.33%	18,515	16,007	2,309	12.47%	15,317	13,437	1,755	11.46%	-0.16%
2	1	24,218	8,088	15,530	64.13%	16,890	6,544	9,945	58.88%	11,637	4,192	7,343	63.10%	-2.64%
3	2	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	-1.23%
4	1	26,279	16,696	9,359	35.61%	18,598	12,397	6,046	32.51%	18,491	13,156	5,110	27.64%	5.64%
5	2	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	1.59%
6	1	26,305	21,636	4,309	16.38%	19,400	16,222	2,923	15.07%	17,718	14,978	2,538	14.32%	5.75%
7	2	47,649	19,860	26,366	55.33%	38,056	18,006	18,863	49.57%	22,640	9,010	12,883	56.90%	-4.23%
8	1	24,666	16,762	7,629	30.93%	17,670	12,424	5,059	28.63%	17,278	12,992	4,053	23.46%	-0.84%
9														
10														
11														
Total	11	273,632	189,242	79,055	28.89%	207,554	149,404	54,140	26.08%	169,491	123,548	42,483	25.07%	9.97%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Oct. 1995)

Attachment B

Plaintiffs' Leon County Court Plans

Leon County Florida Court
Election Districts
Plan A

Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
October, 1995

Leon County Court Plan A

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	1	47,649	19,860	26,366	55.33%	38,056	18,006	18,863	49.57%	22,640	9,010	12,883	56.90%	-0.99%
2	1	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	2.11%
3	1	45,165	36,924	7,610	16.85%	32,887	27,204	5,241	15.94%	31,121	26,029	4,460	14.33%	-6.15%
4	1	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	5.03%
5														
6														
7														
8														
9														
10														
11														
Total	4	192,493	141,712	46,527	24.17%	149,368	113,014	33,099	22.16%	120,171	90,822	26,144	21.76%	11.17%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Oct. 1995)

Leon County Florida Court
Election Districts
Plan B

Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
October, 1995

Leon County Court Plan B

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	1	47,649	19,860	26,366	55.33%	38,056	18,006	18,863	49.57%	22,640	9,010	12,883	56.90%	-0.99%
2	1	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	2.11%
3	1	47,641	39,263	7,724	16.21%	34,498	28,731	5,309	15.39%	32,686	27,496	4,530	13.86%	-1.00%
4	1	48,066	42,191	4,881	10.15%	37,803	33,460	3,642	9.63%	35,361	30,671	3,838	10.85%	-0.12%
5														
6														
7														
8														
9														
10														
11														
Total	4	192,493	141,712	46,527	24.17%	149,368	113,014	33,099	22.16%	120,171	90,822	26,144	21.76%	3.11%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Oct. 1995)

Leon County Florida Court
Election Districts
Plan C

Jerry Wilson, Esq.
E. Walter Terrie, Ph.D.
October, 1995

Leon County Court Plan C

		1990								1995				
	Number	Population				VAP				Registered Voters				District
Dist	Judges	Total	White	Black	%	Total	White	Black	%	Total	White	Black	%	Deviation
1	1	46,475	19,019	26,045	56.04%	37,171	17,369	18,625	50.11%	22,036	8,631	12,672	57.51%	-3.43%
2	1	49,137	40,398	7,556	15.38%	39,011	32,817	5,285	13.55%	29,484	23,645	4,893	16.60%	2.11%
3	1	46,339	37,765	7,931	17.12%	33,772	27,841	5,479	16.22%	31,725	26,408	4,671	14.72%	-3.71%
4	1	50,542	44,530	4,995	9.88%	39,414	34,987	3,710	9.41%	36,926	32,138	3,908	10.58%	5.03%
5														
6														
7														
8														
9														
10														
11														
Total	4	192,493	141,712	46,527	24.17%	149,368	113,014	33,099	22.16%	120,171	90,822	26,144	21.76%	8.73%

Jerry Wilson, Esq. & E. Walter Terrie, Ph.D. (Oct. 1995)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

ANITA L. DAVIS, et al.,

Plaintiffs,

v. CASE NO. TCA 90-40098-MMP

LAWTON CHILES, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Sep. 3, 1992)

This cause was tried before the court sitting without a jury. This is an action for declaratory and injunctive relief challenging the current at-large system of electing judges to the Second Judicial Circuit of the State of Florida and to the Leon County Court (Leon County, Florida). The named plaintiffs bring this action on behalf of themselves and the class of all black residents of the Second Judicial Circuit and Leon County.[1]

Plaintiffs allege that the at-large circuitwide and countywide election of judges for the Second Judicial Circuit and Leon County Court unlawfully dilutes the voting strength of blacks and denies them an equal opportunity to participate in the political process and

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[1] By order dated October 29, 1991, the court certified this action as a class action and designated the named plaintiffs class representatives for the classes consisting of (1) all black residents of the Second Judicial Circuit, and (2) all black residents of Leon County. Doc. 108.

elect candidates of their choice, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended (the "Act"). Plaintiffs also challenge the maintenance of the at-large election system pursuant to 42 U.S.C. § 1983 on the grounds that it violates their rights under the Fourteenth and Fifteenth Amendments to the United States Constitution. To succeed on their constitutional claim, plaintiffs must prove that the system was conceived or operated as a purposeful device to further racial discrimination. *See City of Mobile v. Bolden*, 446 U.S. 55, 62-70, 100 S. Ct. 1490, 1497-1501 (1980).

Defendants are the Governor, the Secretary of State, and the Director of the Division of Elections of the State of Florida Department of State. All are sued in their official capacities only. The court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(3) & 1343(4). Based on the entire record, the court makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

BACKGROUND

The Second Judicial Circuit is composed of Leon, Gadsden, Franklin, Jefferson, Liberty, and Wakulla counties. According to the 1990 census, the total population of the Second Judicial Circuit is 273,632 and the black population is 79,055 – approximately 28.9% of the total population. The voting age population of the Second Judicial Circuit is 207,554 and the black voting age population is 54,140 – approximately 26.1% of the overall voting age population. For Leon County, the total population is

192,493 and the black population is 46,527 – approximately 24.2% of the total. The voting age population of Leon County is 149,368 and the black voting age population is 33,099 – approximately 22.2% of the overall voting age population.

The Second Judicial Circuit has 10 judges. The Leon County Court has four judges. Circuit judges serve six-year terms and county judges serve four year terms. The circuit and county courts are trial courts, with the circuit courts having general jurisdiction of civil and criminal cases and the county courts having limited jurisdiction.

The judges of these courts are elected at-large in circuitwide or countywide non-partisan elections. There is no residency requirement other than residency within the circuit or county. A majority vote requirement applies to judicial elections so if the leading candidate fails to garner a majority in the primary, he or she must face a runoff against the next highest votegetter in the general election. Candidates must run for designated seats on the court and must pay a candidate qualifying fee of five and one-half percent of the annual salary of the office. A petition process also exists whereby a candidate may avoid paying the qualifying fee by obtaining a sufficient number of signatures from qualified persons. *See* Fla. Stat. § 105.035.

No black judge has ever been elected to nor served on the Second Judicial Circuit or the Leon County Court. Black candidates have run for these positions on three occasions since 1980, twice for the Circuit Court and once for the Leon County Court.

DISCUSSION

Section (2)(a) of the Voting Rights Act prohibits states and their political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards practices, or procedures which result in the denial or abridgement of the right to vote on account of race or color. Section 2(b) of the Act provides that

> [a] violation of subsection (a) . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity then other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[2]

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[2] Congress amended § 2 in 1982 in response to the Supreme Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55, 100 S. Ct. 1490 (1980). The *Bolden* Court held that in order to establish a violation of § 2, it must be shown that a challenged scheme was intentionally adopted or maintained for a discriminatory purpose. Congress amended § 2 to make clear that a violation of § 2 could be proved by showing discriminatory effect alone and that the "results" test, which was the standard prior to the *Bolden* decision, is the proper standard in § 2 actions. *See Thornburg v. Gingles,* 478 U.S. 30, 35, 106 S. Ct. 2752, 2758 (1986); *Hall v. Holder,* 955 F.2d 1563, 1567 (11th Cir. 1992).

The term "representatives" includes elected judicial officials for purposes of the Act. *Chisom v. Roemer*, 111 S. Ct. 2354 (1991).

The United States Supreme Court examined the elements of a Section 2 claim in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986). The *Gingles* Court identified a variety of factors which courts are to consider in evaluating Section 2 claims. These factors, which are listed in the Senate Report accompanying the 1982 Amendments to the Act, are as follows:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* U.S.C.C.A.N. 177, 206-07 (footnotes omitted).

The Senate Report also noted that additional factors had been shown to have probative value in establishing a violation. These additional factors are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207 (footnotes omitted).

According to the *Gingles* Court, the most important factors are the existence of racially polarized voting and minority electoral success. 478 U.S. at 48 n.15, 106 S. Ct. at 2765 n.15.[3]

In addition, the *Gingles* Court outlined three "necessary preconditions" which must be satisfied in order to establish a claim of vote dilution. *Id.* at 48, 106 S. Ct. at

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[3] While the Senate Report list is extensive, it "is neither comprehensive nor exclusive." *Gingles*, 478 U.S. 30, 45, 106 S. Ct. 2752, 2763 (1980).

2765. First, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." Second, "the minority group must be able to show that it is politically cohesive." And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S. Ct. at 2766-67. (citations omitted). These three factors are usually referred to as the three "*Gingles* factors."

The Eleventh Circuit is divided as to whether a plaintiff can establish a Section 2 violation simply by proving the three *Gingles* factors or whether, once a plaintiff has established the three *Gingles* factors, the defendant can offer proof of other objective factors in rebuttal which indicate that, under the totality of circumstances, the voting community is not driven by racial bias. *Solomon v. Liberty County*, 899 F.2d 1012, 1013 (11th Cir. 1990) (en banc) (per curiam), *cert. denied*, 111 S. Ct. 670 (1991); *id.* at 1017, 1021 (Kravitch, J., specially concurring); *id.* at 1033 (Tjoflat, C.J., specially concurring) (hereafter *Liberty II*).

For the reasons stated below, this court finds that a vote dilution claim must be evaluated under the totality of the circumstances and that proof of the three *Gingles* factors alone does not establish a case of vote dilution under Section 2 of the Voting Rights Act. First, in amending Section 2, Congress indicated that courts are to evaluate Section 2 claims "based on the totality of circumstances." 42 U.S.C. § 1973(b). Second, the *Gingles*

court described the three factors as "necessary *pre*conditions" to the establishment of a Section 2 violation. 478 U.S. at 50, 106 S. Ct. 2766 (emphasis added). As stated by Chief Judge Tjoflat in his concurring opinion in *Liberty II*,

> The *Gingles* court did not say that a plaintiff who proves the three factors will *invariably* win; it said that the three factors are prerequisites to a successful claim and that they are the "most important" of the factors and are sufficient to make out a claim. But the Court never said that the defendant could not rebut the plaintiff's claim. If the Court meant to deny the defendant an opportunity to rebut the plaintiff's case after the plaintiff has offered evidence of the three factors, then the three factors would be both necessary *and always sufficient* to win under section 2. Such a holding would reject the clear mandate of section 2's language and the Senate Judiciary Committee's report. Moreover, such a holding would render nonsensical the Court's discussion of the totality of the circumstances *after* it had noted the plaintiff's success in proving the three factors. . . . The Court's adherence to the totality of the circumstances test *must* mean that the defendant can rebut the plaintiff's claim – even after the plaintiff has offered proof of the three *Gingles* factors.

899 F.2d at 1035 (citations omitted) (emphasis in original). As stated above, the *Gingles* Court indicated that some factors are more important than others. If the Court had wanted to articulate a standard other than the totality of the circumstances, it would have said that some factors are important and others are not important at all. Moreover, to say that the Senate Report factors are "supportive of, *but not essential to*, a minority voters' claim," is not the

same as saying that satisfaction of the three factors alone will establish a violation of Section 2. Finally, the Supreme Court recently held that a state's interest in maintaining the link between a trial judge's jurisdiction and the area of residency of his or her voters is a legitimate factor to be considered by a court in determining whether a Section 2 violation has occurred under the "totality of circumstances." *Houston Lawyers' Assoc. v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (1991).

Accordingly, the court will determine first whether plaintiffs have satisfied the three *Gingles* factors. if plaintiffs cannot establish three *Gingles* preconditions, they cannot make out a claim under Section 2. However, if plaintiffs satisfy the three preconditions, then plaintiffs will prevail unless defendants can show with evidence of objective factors that, under the totality of the circumstances, the voting community is not driven by racial bias. *Liberty II* at 1035 (Tjoflat, C.J., specially concurring). The "ultimate issue to be decided is whether the political processes were equally open" under the totality of the circumstances. *Id.* at 1036 (quoting S. Rep. at 35).

A. Ability to Draw a Black Majority Subdistrict

As a prerequisite to establishing a claim of vote dilution, "[t]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district." *Gingles*, 478 U.S. at 50, 106 S. Ct. at 2766. It is not necessary to show that the potential subdistrict will contain a supermajority of black citizens of voting age; a simple majority is sufficient to satisfy the first *Gingles* factor. *See Liberty II*,

899 F.2d at 1018 (concurring opinion of Kravitch, J.) *id.* at 1037 (concurring opinion of Tjoflat, C.J.) (plaintiffs who showed ability to draw district with majority black voting age population satisfied the first *Gingles* factor). Plaintiff's expert demographer, Jerry Wilson, has drawn three majority black voting age population subdistricts in the Second Judicial Circuit and for the Leon County Court.

Defendants argue that the population deviations in the proposed subdistricts would violate the one-person, one-vote requirement of the Fourteenth Amendment. However, it is well-settled that the constitutional one-person, one-vote requirement does not apply to judicial elections. *Southern Christian Leadership Conference of Alabama v. Sielman*, 714 F. Supp. 511, 520 (M.D. Ala. 1989), *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973). Accordingly, the court finds that plaintiffs have demonstrated that blacks are a sufficiently large and geographically compact group to constitute a voting age majority in a subdistrict.

B. Racially Polarized Voting – Black Political Cohesiveness and White Bloc Voting

The second and third prerequisites to establishing a claim of vote dilution are a showing that black voters are politically cohesive and that candidates preferred by black voters are generally defeated by white bloc voting. This may be established through evidence of racial polarization in voting; that is, plaintiffs may establish that black voters are politically cohesive by showing that "a significant number of minority group members usually vote for the same candidates." *Gingles*, 478 U.S. at 56, 106

S. Ct. at 2769. The voting preferences of the majority group must also be examined to determine whether "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id.* at 51, 106 S. Ct. at 2766-67.

Both sides offered expert testimony and statistical evidence on the issue of racial polarization. Plaintiffs offered the testimony of their expert, Dr. Allan Lichtman,[4] as well as the testimony of lay witnesses familiar with local elections. Dr. Lichtman studied the two Circuit Court races and the one Leon County Court race in which black candidates have run, as well as the 1976 Florida Supreme Court election involving Justice Joseph Hatchett, who is black. In addition, Dr. Lichtman studied all of the circuitwide and countywide elections in which black candidates have competed against white candidates over the last 20 years – a total of 35 elections.[5]

Defendants relied on two expert witnesses, Dr. Ronald Weber and Dr. Joan Haworth.[6] Drs. Weber and Haworth analyzed many of the same elections as Dr.

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[4] Dr. Lichtman is a Professor of History at the American University, Washington, D.C.

[5] See Plaintiffs' Exhibit 2 "Report on Racially Polarized Voting and its Political Significance: Second Judicial Circuit and Leon County Court," (hereafter, Lichtman Report").

[6] Dr. Weber is a Professor of Government at the University of Wisconsin, and Dr. Haworth is a former Professor of Economics at Florida State University and is currently President of Economic Research Services, Inc.

Lichtman, but also examined a number of elections not analyzed by Dr. Lichtman.

Dr. Weber, like Dr. Lichtman, analyzed the two Circuit Court races and one Leon County Court race in which black candidates have run and the Supreme Court election involving Joseph Hatchett. However, whereas Dr. Lichtman only considered judicial elections where a black candidate ran for office, Dr. Weber performed statistical analysis of all judicial elections since 1966 for the Second Judicial Circuit or Leon County Courts – regardless of whether the elections involved black candidates.

Dr. Haworth analyzed, in addition to the four judicial elections noted above, seven Tallahassee City Commission elections, which were conducted on a non-partisan basis. She also analyzed one extremely close Leon County School Board election for the purpose of determining a rough percentage of white vote necessary for electoral success of black candidates, and the vote within Leon County for ratification of the 1972 constitutional amendment for revising Florida's Judicial Article.

Both plaintiffs' and defendants' experts used bivariate ecological regression analysis and extreme case analysis to study the voting behavior of the circuit and county electorates. Bivariate ecological regression and extreme case analysis are methods approved by the Supreme Court in *Gingles*, and have been used in numerous other Section 2 cases. *See Thornburg v. Gingles*, 478 U.S. at 52-53 n.20, 61, 106 S. Ct. at 2767 n.20, 2772; *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1558 (11th Cir. 1987).

Ecological regression analysis permits estimation of the voting behavior of racial groups through comparison

of the racial composition of the population at each precinct to the division of the vote among competing candidates at each precinct. The regression analysis uses data from all of the precincts participating in an election, and produces estimates of the voting behavior of both whites and blacks. Extreme case analysis looks at the voting results in precincts that are 90% or more black in voter registration and compares them with the results in precincts that are 90% or more white in voter registration, to see if there are differences in the level of support given to candidates of different races in those precincts.

The testimony and report of plaintiffs' expert, Dr. Lichtman, indicate that in the Circuit and County Court races in which black candidates ran, the vast majority of black voters supported the black candidates, while white voters overwhelmingly supported the white candidates. The regression analysis shows that in the 1980 Circuit Court race, 62% of black voters compared to only 5% of white voters supported the black candidate, Robert Travis, Jr. In the 1984 Circuit Court election, black candidate Roosevelt Randolph received 85% of the black vote, but only 28% of the white vote.[7] And in 1988, an estimated 100% of black voters, but only 6% of white voters, supported black candidate Erroll Powell for County Court judge. Lichtman Report, Table 1.

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[7] For the Circuit Court races, Dr. Lichtman also isolated the Leon County results to determine how the Leon County vote broke down. The regression results show that Travis was supported by 85% of black voters in Leon County in his Circuit Court race, compared to 6% of white voters. Randolph's support among black voters in his Circuit Court race was 100% compared to 35% among white voters. Lichtman Report, Table 1.

The extreme case analysis shows similar results. In precincts that were 90% or more black in voter registration, Robert Travis, Jr. received 66% of the vote in the 1980 election, while in precincts with a 90% or more white voter registration he received only 7% of the vote. Roosevelt Randolph in 1984 received 94% of the vote in the predominantly black precincts, compared to 31% of the vote in the predominantly white precincts. In Erroll Powell's 1988 County Court race, he received 71% of the vote in the predominantly black precincts, compared to 7% of the vote in the predominantly white precincts. Lichtman Report, Table 2. All of these black candidates were defeated, despite their strong support from black voters.

Dr. Lichtman also analyzed nine additional races conducted circuitwide in the Second Circuit in which black candidates participated. These include elections for U.S. Senate, Florida Public Service Commission, Second Congressional district, Florida Supreme Court, Secretary of State, and presidential primaries. The regression analysis shows that in eight of these nine elections black voters gave more than 60% of their vote to the black candidates. The mean black vote for candidates was 75% in these additional circuitwide elections. Lichtman Report, p. 10 & Table 3.

In sharp contrast, white voters overwhelmingly supported the white candidates in these elections. The regression results show that in eight out of nine of these additional circuitwide elections, white voters gave more than 60% of their vote to white candidates. The mean

white vote for white candidates in these circuitwide elections was 82%. *Id.*, p. 11 & Table 3.[8]

The additional countywide elections studied include elections for county commission, school board, and other court offices in Leon County. Lichtman Report, Tables 4, 6 & 7. Again, a strong contrast between the voting choices of white and black voters is apparent. In 22 of these 23 countywide races involving black candidates, black voters provided at least 60% of their vote to the black candidates and the mean black vote for these candidates was 93%. *Id.* at p. 11 & Table 4. White voters, however, gave at least 60% of their vote to white candidates in 19 out of 23 of these elections, and did not give a majority of their vote to the black candidates in any of these elections. White voters gave a mean of 71% to the white candidates in these elections. *Id.* at p. 11 & Table 4.

Extreme case analysis also confirmed the polarization in these elections. In the additional countywide and circuitwide elections studied, the predominantly black precincts generally voted heavily for the black candidates, while the predominantly white precincts strongly supported the white candidates in most elections. *Id.* at Tables 5 & 6.

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[8] Again, for the circuitwide races Dr. Lichtman also broke down the Leon County voting results. In eight of nine contests black Leon County voters provided over 60% of their vote for the black candidates, while in eight of nine contests white Leon County voters provided over 60% of their vote to white candidates. The mean black vote in Leon County for the black candidates was 88%, while the mean white vote in Leon County for the white candidates was 83%. Lichtman Report, pp. 10-11 & Table 3.

For all of these elections on which regression analysis was performed, Dr. Lichtman also computed an R^2 coefficient. The R^2 coefficient measures the extent to which the percentage of the vote cast for the black candidate is related to the racial composition of the precinct. The possible value of the coefficient varies from 0 to 1.0, with an R^2 of 1 indicating a perfect relationship between variables. But for two elections, the R^2 values for the elections studied were usually in the mid .70's to mid .90's range, showing an extremely strong association between the racial composition of the precinct and the vote for the black candidate. Dr. Lichtman also computed statistical significance to verify the reliability of his results, and found an extremely high degree of statistical significance. *Id.* at pp. 7-8.

The analysis of these elections shows that black voters consistently provide a high degree of voter support to black candidates and are politically cohesive. White voters, on the other hand, consistently support white candidates and do not proved [sic] enough crossover votes to black candidates for them to win election, even with the significant black support they receive. In only two circuitwide or countywide elections in the past 20 years have black candidates been elected. This constitutes legally significant racial bloc voting.

The court notes that the evidence of racial polarization in this case is stronger than that on which findings of racial polarization were made in *Gingles* and other cases. In the districts where violations were found in *Gingles*, the estimates of black support for black candidates ranged as low as 25 to 36 percent in several elections, while white support for black candidates was often over

30 percent. 478 U.S. at 80-82, 106 S. Ct. 2782-83 (Appendix A to opinion). Moreover, black candidates had previously been elected to the office in question in all but one of the districts where a violation was found in *Gingles*. *Gingles v. Edmisten*, 590 F. Supp. 345, 365-66 (E.D.N.C. 1984); *Thornburg v. Gingles*, 478 U.S. at 74 nn.35 & 36, 106 S. Ct. at 2778-79 nn.35 & 36.

In *Liberty II*, political cohesiveness and legally significant polarized voting were found as a matter of law where five of six county elections were polarized and where polarization was also found in certain exogenous elections, including some of the same elections analyzed by Dr. Lichtman in this case. 899 F.2d at 1019-20 nn.8 & 9 (concurring opinion of Kravitch, J.); *id.* at 1037 (concurring opinion of Tjoflat, J.) *See also*, e.g., *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1530-31 n.12 (M.D. Fla. 1989) (racial polarization was found where black candidates had received a majority of the black vote in six out of 10 elections).

In addition to expert testimony, plaintiffs presented lay testimony from citizens who have been active in election campaigns within the Second Judicial Circuit and Leon County. These witness [sic] confirmed that black voters regularly support black candidates for office in large numbers, and that racial polarization in elections where black candidates run against white candidates countywide and circuitwide is a well-known political reality. Such testimony by lay witnesses is an appropriate

means of establishing the existence of racially polarized voting.[9]

Defendants' experts, Dr. Haworth and Dr. Weber, offered studies concluding that elections are not significantly polarized and that black voters have an equal opportunity to elect candidates of their choice. Defendants' experts, however, did not study all of the same elections that plaintiffs' expert studied. As stated previously, Dr. Haworth analyzed, in addition to the three Second Circuit and Leon County Court races in which black candidates have run, ten elections for other offices in which black candidates participated. Seven of these were Tallahassee municipal elections in which only Tallahassee voters may participate.

It is true that black candidates have had somewhat greater success in these Tallahassee elections than in circuitwide or countywide elections. However, black candidates for the Second Judicial Circuit and Leon County Court must face voters in the entire circuit or the entire county, not just Tallahassee. The Eleventh Circuit held in *Carrollton Branch of NAACP v. Stallings* that reliance on black electoral success in municipal elections "is obviously misplaced" when plaintiffs are challenging a countywide election scheme. 829 F.2d at 1560.

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[9] The district court in *Gingles* relied upon both expert and lay testimony concerning racial polarization, *see Gingles v. Edmisten*, 590 F. Supp. 345, 367 (E.D.N.C. 1984) (three-judge court), as have numerous other courts. *See* e.g., *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1531-32 (M.D. Fla. 1989).

In contrast to Dr. Haworth, Dr. Weber contended that it is erroneous to focus solely upon black versus white elections or elections for offices other than Second Circuit and Leon County judgeships. In addition to the three elections in which there were black candidates, Dr. Weber analyzed the Second Judicial Circuit and Leon County Court elections in which no black candidate participated. He concluded that such elections establish that black voters have equal political opportunity because the winning candidate in these all-white elections often has support from black voters as well as white voters.

A difficulty with Dr. Weber's analysis is its focus on elections in which only white candidates competed. The Supreme Court and lower federal courts have held that the existence of legally significant polarized voting is determined from analyzing elections in which black candidates have run against white candidates for office. The only elections analyzed in *Gingles* were elections in which black candidates ran against white candidates. *See also Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark.) (three-judge court), *aff'd mem.*, 109 S. Ct. 548 (1988) (black voters do not enjoy political equality when "[c]andidates favored by blacks can win, but only if the candidates are white").[10]

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[10] *See also Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990) (in challenge to at-large county commission and school board elections, no white-vs.-white county elections were analyzed); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989) (black vs. white elections are proper focus of inquiry); *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1540 (M.D. Fla. 1989) (findings based only on elections in which black candidates ran).

Dr. Weber's focus on whether black voters have supported white candidates against other white candidates is also inconsistent with the Eleventh Circuit's holding in *Carrollton*. There, the defendants and the district court had criticized plaintiffs' expert for analyzing two white versus white sheriff's races in which one of the candidates had a black deputy sheriff who assisted the white candidate in getting elected. In rejecting the contention that these elections should have been analyzed, the Eleventh Circuit stated: "It is the access of minority voters to the political process, not the majority's access to the black vote, which is the chief concern of Section 2 of the Voting Rights Act." 829 F.2d at 1559. Dr. Weber also excluded from his analysis of racial polarization all elections for offices other than judgeships. Here, he differs from Dr. Haworth, the state's other expert witness, as well as with Dr. Lichtman, plaintiffs' expert.

The analysis of racial polarization in Section 2 cases routinely includes analysis of elections for other offices in which black candidates have participated – sometimes called "exogenous" elections.[11] It is appropriate in this case to examine other elections in which black candidates have run, to help determine the extent of black political cohesion and white bloc voting in the electorate. Countywide and circuitwide elections are obviously the most probative elections in this regard, since the offices being challenged are elected countywide or circuitwide.

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[11] *See Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987); *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523 (M.D. Fla. 1989).

Dr. Weber also used a flawed definition of racial polarization. According to his definition, legally significant racial polarization exists only when elections show "strong" polarization, and polarization is not "strong" unless 80% or more of black voters vote for one candidate while 80% or more of white voters vote for different candidates. This conflicts with the functional test prescribed in *Gingles* which asks whether the degree of white bloc voting is high enough to result in the usual defeat of candidates preferred by black voters. *Gingles*, 478 U.S. at 56-57, 106 S Ct. at 2769-70. Here, the degree of white bloc voting clearly is high enough to have prevented any black candidate from winning circuitwide or countywide in the last 15 years.

In sum, the evidence in this case shows that voting is highly polarized along racial lines in the Second Judicial Circuit and Leon County. Black voters prefer black candidates, but white voters vote sufficiently as a bloc usually to defeat these candidates.

C. Extent of Minority Electoral Success

As stated previously, no black person has ever been elected to the Second Judicial Circuit or the Leon County Court. Black candidates have run for these positions on three occasions since 1980, twice for the Circuit Court and once for the Leon County Court. Moreover, since 1976 no black candidate for any office has been successful in circuitwide voting or countywide voting in Leon County, although black candidates have run in numerous contests over that period. The only two black candidates who have won – Doris Alston and Joseph Hatchett, elected to

the Leon County School Board and to the Florida Supreme Court, respectively, in 1976 – ran as incumbents because they had previously been appointed to the offices in question.

In *Gingles*, black candidates had previously been elected to the House or Senate in all but one of the legislative districts where a violation was found; in some districts, more than one black candidate had been elected. 590 F. Supp. at 365-66. Thus, the record of black electoral defeat in this case is stronger than in *Gingles*.

D. History of Official Discrimination

Florida has a history of racial discrimination with respect to the franchise. Defendants concede that this history of racial discrimination has had the effect and purpose in the past of inhibiting the rights of blacks to register to vote and participate in the democratic process, and has had the effect and purpose of reducing black voter participation.

In the 1870's the names of black voters were removed from the voting lists. In 1889 a poll tax was enacted. A requirement that officeholders post bonds was adopted in 1885. The "eight ballot box" law was enacted in 1889 in an effort to confuse voters. Finally, in 1901, Florida established a primary law which allowed the parties to determine the qualifications of their primary voters. This law was passed so blacks could be excluded from party primaries. Pursuant to this law, the Democratic party in Florida disqualified black voters from voting in their primary and allowed only whites to vote, in what came to be known as the "white primary."

None of these devices are currently in effect in Florida. The poll tax was abolished in 1939. The "eight ballot box" law was abolished in the 1940's. The direct primary was declared unconstitutional by the Florida Supreme Court in 1945. And the bond posting requirement was removed by the 1968 Florida constitution. Moreover, no county within the Second Judicial circuit has ever been covered by the preclearance provisions of Section 5 of the Voting Rights Act.

In addition, Florida has a history of discrimination and segregation in other areas. Transportation facilities were segregated until the 1950's. Pursuant to the 1885 constitution and subsequent statutes, Florida maintained racially segregated public schools until forced to abandon them as a result of *Brown v. Board of Education*, 347 U.S. 483 (1954) and its progeny. Until 1958 blacks were not allowed to attend the University of Florida College of Law. The law school at Florida A & M, which was created in 1951 as a law school for black students, was not accredited until 1955. Florida A & M's Law School was abolished in 1967, one year after the creation of the Florida State University College of Law.

While it is undisputed that Florida has a history of discrimination against its black citizens, a state's history of discrimination is relevant only to the extent that it affects the opportunities of minorities to participate in the political process. *See Gingles*, 478 U.S. at 69, 106 S. Ct. at 2776. The evidence at trial was that no election practice currently utilized directly prevents blacks from registering to vote or going to the polls. Testimony from blacks indicated that they have no problems registering, voting or participating in judicial elections.

However, the Senate Report accompanying the 1982 amendments to Section 2 states that Section 2 "extends beyond formal or official bars to registering and voting, or to maintaining a candidacy." S. Rep. at 30. "[T]his section [of the Act] without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote." Id. at 30 n.120. Further, whether past discrimination affects the opportunities of blacks to participate in the political process can be more readily determined if examined in conjunction with the socio-economic effects on blacks of past discrimination.

E. Socio-Economic Effects of Past Discrimination

Historic discrimination in education, employment, and other areas often results in lower socio-economic status for blacks and other minority groups. *Gingles*, 590 F. Supp. at 361. Statistical evidence presented in this case indicates that blacks still suffer the socio-economic effects of past discrimination. Blacks in the Second Judicial Circuit and Leon County have lower median incomes than whites and are more likely to have incomes below the poverty level than whites. Blacks in the Second Circuit and Leon County have lower rates of high school and college graduation than whites and are much more likely to be unemployed. Blacks are more likely than whites to live in households without access to a car or telephone, and have lower rates of home ownership and lower home values than whites. Lichtman Report, Tables 8-12.

Gingles and other cases have recognized the relevance of lower socio-economic status as a result of past

discrimination. The *Gingles* Court found the lower socio-economic status of blacks in North Carolina gave rise to special group interests and hindered blacks' ability to participate in the political process and elect representatives of their choice. *Gingles*, 478 U.S. at 39, 106 S. Ct. at 2760. As Congress stated in amending Section 2:

> The courts have recognized that disproportionate educational[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation . . . . Where these conditions are shown, and where the level of black participation is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. at 29 n.114 (citations omitted). *See also United States v. Marengo County Comm'n*, 731 F.2d 1546, 1569 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984).[12]

The court finds that the lower socio-economic status of blacks in the Second Circuit and in Leon County hinders blacks' ability to participate in the political process and elect candidates of their choice. First, blacks are registered to vote in lower numbers than whites in the

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[12] Plaintiffs' expert, Dr. Lichtman, testified that differentials in income have a direct impact on the resources that can be mustered behind political campaigns or "getting out the vote" drives; that differences in occupation and educational levels affect the type of candidates that can be sponsored for office, the kind of persons that emerge as workers and leaders in campaigns. Dr. Lichtman also testified that the availability of phones and vehicles has a major effect on one's ability to organize campaigns, to persuade voters, and to get out the vote.

Second Circuit and in Leon County. In 1990, the percentage of voting age blacks registered to vote in the Second Judicial Circuit was 63.4 percent while for whites it was 66.7 percent. The percent of voting age blacks registered to vote in Leon County was 59.2 percent while the percentage of voting age whites registered to vote was 64.6 percent.[13]

In addition, Dr. Lichtman testified that actual voter turnout in Leon County among minorities is lower than it is for whites.[14] Dr. Lichtman, however, did not provide any statistics or produce any evidence of just how much lower the turnout is among minorities. Further, there appears to a higher "roll-off" effect among blacks than among whites.[15] Defendants' expert, Dr. Weber, admitted that the degree to which voters roll-off is likely to be related to the voters' educational level. Thus, it appears that the lower educational levels of blacks in the Second Circuit and Leon County causes blacks to have higher "roll-off." This is yet another example of how the socio-

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[13] This is in contrast to *Nipper v. Chiles* (M.D. Fla. June 2, 1992), where the court found that the at-large system of electing judges to the Fourth Judicial circuit and the Duval County Court does not violate Section 2 of the Act. Blacks are registered at higher rates than whites in both the Fourth Judicial circuit and Duval County. Slip. op. at 13.

[14] Leon County keeps records of actual sign-in data. The other counties in the Second Circuit apparently do not. The court in *Nipper v. Chiles* stated that "[n]o comprehensive evidence on black and white voter turnout was presented." Slip op. at 31, n.23.

[15] "Roll-off" occurs when the total vote in a particular election is less than the number of voters who signed in at the polls that day.

economic effects of past discrimination hinder the ability of blacks to participate in the political process and elect candidates of their choice.

Defendants argue that plaintiffs did not offer any direct evidence that there is any causal connection between economic disparities and reduced political participation by minorities. However, as Congress stated in amending Section 2, "where the level of black participation is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." S. Rep. at 29 n.114. Accordingly, plaintiffs have demonstrated that blacks suffer the socio-economic effects of past discrimination which hinder their opportunity to participate in the political process and to elect candidates of their choice.

As for the expense of judicial campaigns, testimony at trial indicated that a great deal of the political communication in the black community was accomplished through churches and community organizations, thus offsetting to some extent the need for expensive campaign publicity and media expense. In addition, while judicial candidates must pay a candidate qualifying fee of five and one-half percent of the annual salary of the office, a petition process also exists whereby a candidate may avoid paying the qualifying fee by obtaining a sufficient number of signatures from qualified persons. *See* Fla. Stat. § 105.035. Thus, the court finds that the expense of judicial campaigns does not significantly affect the ability of blacks in the Second Judicial Circuit and Leon County to participate in the political process and to elect candidates of their choice.

E. Use of Practices or Procedures that May Enhance the Opportunity for Discrimination Against the Minority Group

1. Size of election districts

Plaintiffs contend that the Second Judicial Circuit and Leon County are unusually large election districts. The Second Judicial Circuit covers approximately 3,786 square miles, while Leon County covers approximately 676 square miles. The population distribution in the Second Circuit consists of the City of Tallahassee and Leon County, surrounded by five predominately rural counties: Gadsden, Liberty, Franklin, Wakulla and Jefferson. The size of the circuit is dictated by the low population density in the five surrounding counties. Only Gadsden County, with a population of 41,105 residents according to the 1990 census, contains as many as fifteen thousand residents of the five predominantly rural counties. The Second Circuit is the fifth smallest in terms of size of population of the state's 20 circuits.

All six counties in the circuit are served by the same major media sources. Most voters in the circuit have access to the one major daily newspaper in the circuit, the *Tallahassee Democrat*. The television stations and radio stations located in Tallahassee generally provide coverage throughout the circuit. Thus, the size of the circuit does not meaningfully inhibit the ability of the candidates to obtain media publicity throughout the circuit.

On the other hand, a large district may "[make] it more difficult for Blacks to get to polling places or to campaign for office," thus, "impair[ing] the access of blacks to the political process." *Rogers v. Lodge*, 458 U.S.

613, 627, 102 S. Ct. 3272, 3280 (1982); *See McMillan v. Escambia County, Florida*, 748 F.2d 1037, 1044 (5th Cir. 1984) (large size of Escambia County, which spans 657 square miles, found to enhance the problems faced by blacks seeking access to the political process). In fact, in *Solomon v. Liberty County*, this court found that Liberty County alone "present[s] a vast area to cover in an at-large campaign, and this factor could work to the detriment of black candidates because of their lower average income." *Solomon v. Liberty County*, Nos. TCA 85-7009-MMP, 85-7010-MMP, slip op. at 13 (May 4, 1987), *vacated on other grounds*, 899 F.2d 1012 (11th Cir. 1990) (en banc) (per curiam), *cert. denied*, 111 S. Ct. 670 (1991).

However, the testimony at trial of black judicial candidates did not indicate that the size of the Second Circuit prevented them from campaigning in all areas of the circuit. While one candidate testified that he did not campaign in Liberty County, he stated that it was because Liberty County has a very small black population, not because its distance from Tallahassee or the size of the circuit made it unfeasible. Further, plaintiffs, presented no evidence of blacks having difficulty getting to polling places. This case is not like *Hall v. Holder*, 955 F.2d 1563 (11th Cir. 1992) where there was only one polling place for the entire 219 square mile county. *Id.* at 1566.

Accordingly, the court finds that the size of the election districts, the Second Judicial Circuit and Leon County, does not lessen the opportunities of blacks to participate in the political process and elect candidates of their choice.

2. Majority vote requirement

The run-off requirement mandating a second election if no candidate wins a majority in the first election can contribute to the dilutive effect of at-large voting. *See United States v. Marengo County Comm'n*, 731 F.2d at 1570. Florida's majority vote requirement was adopted in 1913. Dr. William Rogers, defendants' expert historian, testified that the majority vote requirement was not adopted with the intent to discriminate against black voters because it was adopted at a period of time in which black voters had not been a significant force in Florida elections by virtue of the white primary. Rather, the majority vote requirement was adopted to streamline Florida elections.

Roughly around 1900, and thereafter, Florida adopted primary laws to provide for primary nomination of Democratic and Republican candidates for elective office. After Reconstruction, Florida became overwhelmingly Democratic in its voter registration and Republicans were virtually eliminated as a political force. Since obtaining the Democratic party nomination was tantamount to victory in the general election, the majority vote requirement was instituted to insure that the victorious candidate received support from a majority of the voters. It thus insured that the candidate receiving the Democratic nomination and thus elected, was one who was preferred by a substantial percentage of the populous. Thus, the court finds that the majority vote or runoff requirement was not adopted for a discriminatory purpose.

Further, the court finds that the majority vote requirement has not hindered black electoral success. The

typical situation in which a runoff election can operate to the detriment of minority voters occurs when a minority preferred candidate leads in the first primary, but loses the runoff to an opponent who obtains the majority of the vote originally cast for the eliminated candidates. Both the 1980 election for Circuit Court judge and the 1988 election for Leon County Court judge involved runoffs. In neither case, however, did the black candidate make the runoff. Accordingly, the court finds that the majority vote requirement does not lessen blacks' opportunity to participate in the political process and to elect candidates of their choice. Further, the court finds that the State of Florida has a valid interest in requiring that a successful judicial candidate gain the support of a majority of the voters.

3. Numbered place system

Florida also maintains a numbered place system, whereby a candidate for circuit or county judge must run for a designated seat. The requirement that candidates run for numbered posts may have an adverse effect on minorities since it forces head-to-head contests between white and black candidates and prevents blacks from concentrating their votes in a large field of candidates. *McMillan v. Escambia County*, 748 F.2d at 1044 n.16.

The numbered place system was also created in 1913. The unrebutted testimony of defendants' expert was that the numbered place system was designed to avoid confusion and to prevent pitting incumbents against each other. Defendants' expert also testified that, in the context of judicial elections, the numbered place system assists in

reducing turnover and minimizes challenges to incumbents. Accordingly, the court finds that the numbered place system was not designed for a discriminatory purpose nor does it impede the ability of blacks to participate in the political process and elect candidates of their choice.

4. Use of staggered terms

Staggered term provisions are used for judicial elections to prevent large scale turnover on the courts at one time. The unrebutted testimony of defendants' expert was that staggered terms do not have a significant effect on the ability of black voters to elect candidates of their choice. The requirement simply serves the state's legitimate interest in maintaining a stable judiciary by ensuring that there will not be large-scale judicial turnover in any single election year. Thus, the court finds that the use of staggered terms is not for a discriminatory purpose nor does it affect the ability of blacks to participate in the political process and elect candidates of their choice.

5. Judicial candidate filing fees

Florida imposes a filing fee of 5.5% of the annual salary of the office as a prerequisite for qualifying as a candidate for Circuit and County Court judgeships. Plaintiffs argue that since circuit court salaries are now $90,000.00 and county court salaries are over $80,000, a candidate must pay thousands of dollars simply to run for office. Plaintiffs argue that such "enormous" filing fees impose a disproportionate burden on minorities, who generally have fewer financial resources at their

disposal. Since the filing fees can be avoided altogether by qualifying through the petition method, see above, the court finds that qualifying fees do not lessen the opportunities of blacks to participate in the political process and to elect candidates of their choice.

F. Candidate Slating Process

There is no candidate slating process for judicial office in the Second Judicial Circuit or Leon County.

H. Use of Racial Appeals in Campaigns

The testimony at trial revealed only one instance in recent history of overt racial appeals in political campaigns within the Second Judicial Circuit or Leon County. In 1990, Jim Fair, a candidate for the Tallahassee City Commission, published a series of advertisements urging white voters to join together to defeat black support for incumbent black City Commissioner Dorothy Inman. In the election in which Inman was challenged by five white males, Inman was re-elected on the first ballot, obtaining approximately 60% of the vote cast. In winning the election, Inman won at least a plurality of the vote in every precinct within the city, including all overwhelmingly white precincts. Fair finished last, receiving three percent of the vote.

In addition, there was testimony that during a campaign appearance in East Point in Franklin County, Florida, Robert Travis, who ran for Circuit Court judge in 1980, was confronted by a white man who warned him that he would not be welcomed at any more rallies there,

and that if he did get elected judge he "best not come back." Such testimony is probative only of what one person said, and not of any "outright history of threats" from the white population. Thus, the court finds that overt racial appeals not only rarely occur within the Second Judicial Circuit, but are likely to create a backlash among both blacks and whites if they do.

I. Responsiveness on the Part of Elected Officials to the Particularized Needs of the Members of the Minority Group

The evidence indicates that the current circuit and county judges are fair and impartial in the performance of their official duties. Testimony of the incumbent judges indicated that minority votes are highly sought by all successful judicial candidates. The incumbent judges testified that a judge would be foolish to ignore the black community in terms of obtaining support and that the judge who appeared to show a lack of sensitivity to black voters would find himself vulnerable in a contested election.

There was testimony that a perception exists among the black community that the judicial system is an exclusive white-male club, and that it is difficult for blacks to obtain just treatment in the judicial system. However, witnesses also agreed that this perception is erroneous and that the circuit and county court judges are fair to both blacks and whites. Moreover,

> [t]he Voting Rights Act is not directed to 'perceptions' about 'the system.' Instead, the Act is directed to remedy inequalities in voting

> where the minority group has less opportunity to participate in the political process and to elect representatives of their choice. Thus, the perception about the judicial system that exists in the black community is irrelevant to this case.

Nipper v. Chiles, (M.D. Fla. June 2, 1992) slip. op. at 36. Accordingly, to the extent that this factor is relevant,[16] the court finds that there is no lack of responsiveness by these judges to the needs of the black community.

J. Whether the Policy Underlying the State's Use of an At-large Election System for Judges is Tenuous

Defendants assert that the state has an interest in maintaining a link between a trial judges's jurisdiction and the judge's election base.[17] The court finds that the link between a judge's jurisdiction and elective base serves to foster judicial independence. In a system of single member districts there could be some pressure on elected judges to respond to specific electoral constituents when one of their constituents is involved in litigation against a non-resident of that subdistrict. The at-large system eliminates this pressure by linking the judge's jurisdiction and elective base. *See Houston Lawyers' Ass'n v. Attorney General of Texas*, 111 S. Ct. 2376, 2381 (the State's interest in maintaining "the link between

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[16] At least one court has stated that because of the nature of judicial offices, this factor is of little relevance in judicial cases. *Clark v. Edwards*, 725 F. Supp. 285, 301 (M.D. La. 1988).

[17] A Circuit Court judge's jurisdiction extends throughout the entire circuit. A County Court judge's jurisdiction extends through the entire county.

a district judge's jurisdiction and the area of residency of his or her voters – is a legitimate factor to be considered by courts among the 'totality of circumstances' ").

K. The Size of the Candidate Pool

Under the Florida constitution, a candidate for either circuit judge or county judge must have been a member in good standing of the Florida Bar for at least five years prior to his or her obtaining judicial office. Fla. Const. Art. V., § 8. These requirements substantially limit the eligible pool of qualified black judicial candidates.

To illustrate this point, Dr. Haworth calculated (a) the number of black attorneys as a percent of the total number of attorneys of the Florida Bar located in the Second Judicial Circuit and Leon County, (b) the percentage of black attorneys eligible to be circuit or county judges, and (c) the percentage of attorneys with years of experience in the Florida Bar similar to those possessed by the incumbent judges when they were first selected (the "probable" pool). Dr. Haworth's research indicates that black attorneys constituted approximately 4% of the total pool, 3% of the eligible pool, and about 4% of the likely pool. Identical percentages existed for black attorneys in Leon County.[18]

The court finds that plaintiffs have satisfied the three *Gingles* factors; that is, plaintiffs have demonstrated that

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[18] While plaintiffs are correct that the number or percentage of black attorneys eligible to serve as judges is not a controlling factor, it is a factor to be considered. *See Martin v. Allain*, 658 F. Supp. 1183, 1203 (S.D. Miss. 1987).

blacks are a sufficiently large and geographically compact group to constitute a majority in a subdistrict, that blacks in the Second Judicial Circuit and Leon County are politically cohesive, and that the white majority votes sufficiently as a bloc to enable it usually to defeat the preferred candidate of blacks.

In addition, other Senate Report factors, as found above, support plaintiffs' claim of unlawful vote dilution under the totality of the circumstances. These include blacks' lack of electoral success in circuitwide or countywide elections, the history of racial discrimination in voting practices, the history of discrimination in other areas and the continuing socio-economic disparities between blacks and whites which hinder the ability of blacks to participate in the political process and to elect candidates of their choice.

The court concludes that, under the totality of the circumstances, the current at-large system for electing Second Judicial Circuit and Leon County Court judges denies black voters an equal opportunity to participate in the political process and to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act.

The court further finds that the current at-large system was not established or has been maintained for a discriminatory purpose in violation of the Fourteenth and Fifteenth Amendments. *See Escambia County v. McMillan*, 466 U.S. 48 (1984). Their claim brought pursuant to 42 U.S.C. § 1983 must therefore fail.

Accordingly, it is

ORDERED:

1. The Clerk is directed to enter judgment for the plaintiffs and against the defendants on plaintiffs' Voting Rights Act claim, 42 U.S.C. § 1973 and for the defendants and against the plaintiffs on their 42 U.S.C. § 1983 claim.

2. The parties are directed to file submissions within thirty (30) days of docketing of this order as to how the court should proceed to determine the appropriate remedy.

DONE AND ORDERED this 3rd day of September, 1992.

/s/ Maurice M. Paul
United States District Judge

TABLE 1

ECOLOGICAL REGRESSION ESTIMATES: BLACK V. WHITE CONTESTS
SECOND CIRCUIT AND LEON COUNTY JUDICIAL ELECTIONS

	% of Black Voters Voting for Black Cand.(s)	% of Black Voters Voting for White Cand.(s)	% of White Voters Voting for Black Cand.(s)	% of White Voters Voting for White Cand.(s)	R^2	Stat. Signif.
Second Circuit						
1980 Primary Black Cand.: Robert Travis						
Circuit Wide	62	38	5	95	.89	.00001
Leon County	85	15	6	94	.91	.00001
1984 Primary Black Cand.: Roosevelt Randolph						
Circuit Wide	85	15	28	72	.77	.00001
Leon Co.	100	0	35	65	.89	.00001
Leon County Judge						
1988 Primary Black Candidate: Erroll Powell	100	0	6	94	.90	.00001

Table 2

EXTREME CASE ANALYSIS: BLACK V. WHITE CONTESTS
PERCENT OF VOTERS VOTING FOR BLACK CANDIDATE
PREDOMINANTLY BLACK AND PREDOMINANTLY WHITE PRECINCTS
SECOND CIRCUIT AND LEON COUNTY JUDICIAL ELECTIONS

	Predominantly Black Precincts	Predominantly Whit Precincts
	% of Voters Voting for Black Candidate	% of Voters Voting for Black Candidat
Second Circuit		
1980 Primary Black Cand.: Robert Travis		
Circuit Wide	66	7
Leon County	66	6
1984 Primary Black Cand.: Roosevelt Randolph		
Circuit Wide	94	31
Leon County	94	34
Leon County Judge		
1988 Primary Black Cand.: Erroll Powell		
	71	7

TABLE 3
ECOLOGICAL REGRESSION ESTIMATES: BLACK V. WHITE CONTESTS
SECOND CIRCUIT: CIRCUIT-WIDE ELECTIONS

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1970 Primary U.S. Senate Black Cand.: A. Hastings						
Leon Co.	87	13	3	97	.94	.00001
Circuit	72	28	2	98	.87	.00001
1972 Primary President Black Cand.: S. Chisholm						
Leon Co.	49	51	3	97	.90	.00001
Circuit	44	56	2	98	.82	.00001
1974 Primary Pub. Ser. Comm. Black Cand.: A. Hastings						
Leon Co.	99	1	29	71	.76	.00001
Circuit	62	38	33	67	.40	.00001

Second Circuit (continued)

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1976 Primary State Sup. Ct. Black Cand.: J. Hatchett						
Leon Co.	100	0	62	38	.79	.00001
Circuit	100	0	60	40	.54	.00001
1984 Primary President Black Cand.: J. Jackson						
Leon Co.	87	13	1	99	.98	.00001
Circuit	80	20	1	99	.94	.00001
1986 Primary						
U.S. Rep. 2 Black Cand. Greadington						
Leon Co.	91	9	23	77	.82	.00001
Circuit	64	36	19	81	.57	.00001
1988 Primary President Black Cand.: J. Jackson						
Leon Co.	86	14	8	92	.98	.00001
Circuit	82	18	7	93	.97	.00001

Second Circuit (continued)

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1990 Primary Sec. of State Black Cand.: A. Hastings						
Leon Co.	100	0	16	84	.94	.00001
Circuit	87	13	19	81	.84	.00001
1990 Runoff Sec. of State Black Cand.: A. Hastings						
Leon Co.	96	4	8	92	.93	.00001
Circuit	84	16	16	84	.80	.00001

Leon County (continued)

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1980 General						
Sup. of Elect. Black Cand. Mobley, Jr.	77	23	9	91	.90	.00001
1982 Primary						
County Comm. D.3 Black Cand. A. Richardson	100	0	9	91	.91	.00001
Sch. Bd. D.5 Black Cand. H. Fontenot	61	39	30	70	.63	.00001
1982 Runoff						
County Comm. D.3 Black Candidate: A. Richardson	100	0	20	80	.88	.00001
1984 Primary						
Sup. of Ele. Black Cands. Collins & Davis	100	0	37	63	.75	.00001
Co. Comm. D.1 Black Cand. Ford	91	9	25	75	.87	.00001
Co. Comm. D.5 Black Cand. Burt	78	22	25	75	.80	.00001
Sch. Bd. D.2 Black Cand. Inman	100	0	40	60	.85	.00001

Leon County (continued)

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1984 Runoff						
Sup. of Elect. Black Cand. Collins	100	0	36	64	.77	.00001
1984 General						
Sup. of Elect. Black Cand. Collins	100	0	33	67	.93	.00001
1986 General						
Sch. Bd. D.3 Black Cand. Houston	29	71	31	69	.02	-
1988 Primary						
Sch. Bd. D.3 Black Cands. Houston & Young	100	0	50	50	.78	.00001
Sch. Bd. D.4 Black Cand. C. Richardson	100	0	14	86	.91	.00001
1988 Runoff						
Sch. Bd. D.3 Black Cand. Houston	98	2	46	54	.82	.00001
Sch. Bd. D.4 Black Cand. C. Richardson	100	0	26	74	.94	.00001

Leon County (continued)

	% of Black Voters Voting for Black Candidate(s)	% of Black Voters Voting for White Candidate(s)	% of White Voters Voting for Black Candidate(s)	% of White Voters Voting for White Candidate(s)	R^2	Stat. Signif.
1988 General						
Sch. Bd. D.3 Black Cand. Houston	100	0	37	63	.92	.00001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3547

ANITA DAVIS, LEE E. HARRIS,
LAFAYE DENISE BIRCH, et al.,

Plaintiffs-Appellants,

versus

LAWTON CHILES, SANDRA MORTHAM,
FLORIDA SECRETARY OF STATE, et al.,

Defendants-Appellees.

On Appeal form [sic] the United States District Court
for the Northern District of Florida

(Filed Jun. 26, 1998)

BEFORE: BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 96-3547

District Court No. 90-CV-40098

ANITA DAVIS, LEE E. HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, KIM T. LYLES,

Plaintiffs-Appellants,

versus

LAWTON CHILES; SANDRA MORTHAM, FLORIDA SECRETARY OF STATE; DAVID RANCOURT, DIRECTOR, DIVISION OF ELECTIONS, FLORIDA DEPARTMENT OF STATE,

Defendants-Appellees,

JIM SMITH, DOT JOYCE,

Defendants.

Appeal from the United States District Court
for the Northern District of Florida

(Filed Apr. 30, 1998)

Before BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

FAY, Senior Circuit Judge concurred specially and filed an opinion.

*Honorable Maurice B. Cohill, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Entered: April 30, 1998
For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: JUL 06 1998

§ 2, Voting Rights Act of 1965, 42 U.S.C. § 1973.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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No. 98-512

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANITA DAVIS, REV. LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS and KIM T. LYLES,
Petitioners,

v.

LAWTON CHILES, SANDRA MORTHAM, and DAVID RANCOURT,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Restated)

1. Whether the degree of evidence of racial bloc voting in this case, coupled with the profound adverse constitutional and statutory alterations to Florida's method of selecting trial judges required by petitioners' proffered remedies under Section 2 of the Voting Rights Act, outweigh Florida's strong interest in maintaining its current system?

2. Whether the Eleventh Circuit's holding here, which is consistent with its previous holdings, and in harmony with prior and subsequent decisions of other courts on this same subject, nevertheless conflicts with *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991)?

3. Whether, as a result of the Eleventh Circuit's decision, there remain unresolved issues of national importance regarding the appropriate standards for evaluating a Section 2 vote dilution challenge to at-large elections for state trial judges?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 2
PRELIMINARY STATEMENT 3
REASONS FOR DENYING THE WRIT 4

The Eleventh Circuit's decision continues that Court's view first expressed in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. (1994)(en banc), *cert. denied*, 514 U.S. 1083 (1995), that Florida's interest in maintaining its method of selecting trial judges is sufficiently strong so as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have shown below. Moreover, that particularized evidence does not amount to gross racial vote dilution which is necessary for a court to consider imposing as a remedy profound constitutional and statutory alterations to Florida's trial judge selection system. Petitioners' arguments are not new; several circuit courts have consistently rejected the type of claims petitioners assert here, and this Court has just as consistently denied certiorari in those cases. Accordingly, there is neither decisional conflict nor unresolved issues of national importance for evaluating a Section 2 vote dilution challenge to at-large elections for state judges.....4

I. THE ELEVENTH CIRCUIT'S LATEST DECISION ON THE SUBJECT OF SECTION 2 REMEDIES IN JUDICIAL ELECTION LITIGATION IS CONSISTENT WITH DECISIONS FROM OTHER CIRCUITS IN REJECTING THE ARGUMENT THAT PROFOUND CONSTITUTIONAL AND STATUTORY ALTERATIONS OF A STATE'S TRIAL JUDGE SELECTION SYSTEM ARE ALWAYS JUSTIFIED REGARDLESS OF THE DEGREE OF EVIDENCE OF RACIALLY POLARIZED VOTING 5

II. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOUSTON LAWYERS' ASSOCIATION V. ATTORNEY GENERAL OF TEXAS*, 501 U.S. 419 (1991) OR THE FIFTH CIRCUIT'S DECISION IN WHICH THIS COURT DENIED CERTIORARI.....16

III. SECTION 2 JURISPRUDENCE PERTAINING TO JUDICIAL ELECTIONS DEMONSTRATES THAT THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 JUDICIAL ELECTION VOTE DILUTION CHALLENGE.....19

CONCLUSION.....21

TABLE OF AUTHORITIES

Cases — Page(s)

Banco Industrial de Venezuela v. Credit Suisse,
99 F.3d 1045, 1049 (11th Cir. 1996).....3

California v. Rooney, 483 U.S. 307 (1987) 3

Cane v. Worcester County, Maryland,
847 F.Supp. 369 (D.Md. 1994),
aff'd in part and rev'd in part,
35 F.3d 921, 928 (4th Cir. 1994).....7

Cousin v. McWherter, 46 F.3d 568, 577 (6th Cir. 1998).....*10*

Cousin v. Sundquist
145 F.3d 818, 822 (6th Cir. 1998) .....*passim*

Houston Lawyers' Association v. Attorney General of Texas, 501 U.S. 419 (1991).....*passim*

League of United Latin American Citizens (LULAC) v. Clements,
999 F.2d 831, 872 (5th Cir. 1993) (en banc),
cert. denied, 510 U.S. 1071 (1994) .....*passim*

Milwaukee Branch of the N.A.A.C.P. v. Thompson,
116 F.3d 1194 (7th Cir. 1997),
cert. denied, __U.S. __, 118 S. Ct. 853 (1978)....*passim*

Nipper v. Smith,
39 F.3d 1499 (11th Cir. 1994 (en banc),
cert. denied, 514 U.S. 1083 (1995).....*passim*

Southern Christian Leadership Conference (SCLC)
v. Sessions,
56 F.3d 1281 (11th Cir. 1995) (en banc),
cert. denied, 516 U.S. 1045 (1996).....*passim*

Thornburg v. Gingles, 478 U.S. 30 (1986).....*passim*

Voinovich v. Quilter, 507 U.S. 146, 153 (1993).....4

White v. Alabama, 74 F.3d 1058 (11th Cir. 1996).....6

Constitutional Provisions

Fla. Const. art. V, § 9.....12, 13
Fla. Const. art. V, § 10.....12, 13
Fla. Const. art. V, § 10(a).....12, 13

Statutes

28 U.S.C. Sec. 1254(1) 1
Sec. 105.011(2), Fla. Stat.....12
Sec. 105.051, Fla. Stat.....12
Sec. 105.051(2), Fla. Stat. 12
Sec.105.061, Fla. Stat.....12

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On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

Respondents' Brief in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

Petitioners have correctly identified the opinions below.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

Respondents generally accept petitioners' statement of the case for jurisdictional purposes only, subject to the following. First, as the Eleventh Circuit found, a black judge appointed to the bench was reelected without opposition, and a black lawyer recently defeated a white candidate for judge in Leon County, Florida. App. 3a-4a. Second, although the Eleventh Circuit avers that no black judges have been appointed to the Leon County Court, App. 6a, fn. 6, a black lawyer has been appointed to the county bench. See certificate of appointment, App. 1a, accompanying this brief. Thus, at present, of the 15 judgeships in the affected jurisdictions, App. 105a, three are filled by African-Americans. Third, although the lower courts discounted the effect of incumbency, the Eleventh Circuit's reference to a specific 1992 election, App. 4a, fails to address the fact that the successful white candidate was a multi-term incumbent. App. 49a. Fourth, in conducting the required totality of the circumstances analysis as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), the district court concluded that the only basis for finding vote dilution was the socio-economic effects of past discrimination, and that finding is based on a black-white voter registration differential of 3% in the judicial circuit and 5% in the county (with blacks registering at the lower percentages), from which the court presumed a hindrance of blacks' opportunity to participate in the electoral process and elect candidates of choice. App. 127a-129a.

With specific regard to petitioners' efforts to meet *Gingles'* totality of the circumstances requirement, the district court found--and petitioners do not dispute--the following:

(1) There are no present effects of past racial discrimination, as blacks have no difficulty registering, voting or participating in judicial elections. App. 125a.

(2) The size of the election district does not lessen voting and election opportunities for blacks. App. 130a.

(3) The majority vote requirement was not adopted for a discriminatory purpose or to lessen voting and election opportunities for blacks. App. 132a-133a

(4) The use of a numbered place system, staggered terms and judicial candidate filing fees do not lessen voting and election opportunities for blacks. App. 134a-135a.

(5) There is no candidate slating process. App. 135a.

(6) There are no racial appeals in campaigns; if there were any, they would "likely create a backlash among both blacks and whites. . ." App. 136a.

(7) There is no lack of community responsiveness to the needs of the black community. App. 137a.

PRELIMINARY STATEMENT

In that this Court reviews judgments, and not statements in opinions, *California v. Rooney*, 483 U.S. 307 (1987), it is not necessary at this time to address two legal errors implicating the findings of fact: (1) the Eleventh Circuit's reweighing of the evidence, albeit in dicta, App. 22a-28a, see *Banco Industrial de Venezuela, C.A. v. Credit Suisse*, 99 F.3d 1045, 1049 (11th Cir. 1996) ("we cannot reweigh the evidence and credibility and reach our own factual conclusions about culpability."); and (2) the district court did not conduct the required "intensely local appraisal of the design and impact" of the subject judicial selection system, *Gingles*, 478 U.S. at 79, through "a searching practical evaluation of the 'past and present reality' of that system's

operation, *Gingles*, 478 U.S. at 79. This in turn requires a functional view of the political process, id., the purpose of which is to show that the challenged electoral practice "interacts with social and historical conditions to cause an inequality," *Gingles*, 478 U.S. at 47, that "impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). The district and circuit courts' primary reliance on vote totals, as demonstrated by the decisions accompanying the petition for writ of certiorari, does not comport with this analytical standard.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit's decision continues that Court's view first expressed in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. (1994)(en banc), *cert. denied*, 514 U.S. 1083 (1995), that Florida's interest in maintaining its method of selecting trial judges is sufficiently strong so as to outweigh, as a matter of law, whatever evidence of vote polarization petitioners may have been shown below. Moreover, that particularized evidence does not amount to gross racial vote dilution which is necessary for a court to consider imposing as a remedy profound constitutional and statutory alterations to Florida's trial judge selection system. Petitioners' arguments are not new; several circuit courts have consistently rejected the type of claims petitioners assert here, and this Court has just as consistently denied certiorari in those cases. Accordingly, there is neither decisional conflict nor any unresolved issue of national importance for evaluating a Section 2 vote dilution challenge to at-large elections for state judges.

I. THE ELEVENTH CIRCUIT'S LATEST DECISION ON THE SUBJECT OF SECTION 2 REMEDIES IN JUDICIAL ELECTION LITIGATION IS CONSISTENT WITH DECISIONS FROM OTHER CIRCUITS IN REJECTING THE ARGUMENT THAT PROFOUND CONSTITUTIONAL AND STATUTORY ALTERATIONS OF A STATE'S TRIAL JUDGE SELECTION SYSTEM ARE ALWAYS JUSTIFIED REGARDLESS OF THE DEGREE OF EVIDENCE OF RACIALLY POLARIZED VOTING.

As in *Nipper v. Smith, supra*, petitioners proceed upon an erroneous view that a State's interest in its judicial system operates as an absolute bar to a Section 2 vote dilution claim, regardless of the degree or extent of vote dilution shown in a particular case. Section 2 jurisprudence since *Nipper* amply and unwaveringly demonstrates that petitioners' argument flows from a fundamentally flawed foundation.

The argument's fatal flaw is in its presumption that once vote dilution is shown, regardless of its degree, petitioners are automatically entitled to a remedy that includes substantial alteration of the structure of a State's judiciary necessitating a re-write of its constitution and statutes. As demonstrated below, Section 2 judicial election jurisprudence categorically rejects petitioners' argument.

The most recent demonstration of petitioners' flawed foundation is found in *Cousin v. Sundquist*, 145 F.3d 818, 822 (6th Cir. 1998). In that case, the court considered Section 2 proposed remedies of single-member judicial districts within a single county, and cumulative voting, weighed against the particularized evidence of vote dilution. In rejecting these proposals, the court found that they (1) violated "Tennessee's important and substantial linkage interest (,)" (2) were designed to achiev(e) proportional representation.. ., a purpose for which Section 2 of the Voting Rights Act was not intended, and . . .(with regard to cumulative voting, was) a particularly inappropriate remedy when applied to the election of state court judges."

Of profound significance for the purpose of the case *sub judice*, that court said:

> Our treatment of the issues is consistent with the latest opinions from other Courts of Appeals dealing with Voting Rights Act challenges to the conduct of judicial elections. See *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194 (7th Cir. 1997)(involving a challenge to the election of circuit court and state appellate court judges in Milwaukee County), *cert denied*, --- U.S.--- 118 S.Ct. 853, 139 L.Ed 2d 753 (1998); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996)(involving a challenge to the method of electing judges to Alabama's civil and criminal appellate courts); *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994)(en banc)(involving a challenge to Florida's method of electing judges to the state's Fourth Judicial Circuit); *LULAC*, 999 F.2d 831

(involving a challenge to Texas' system of electing state court judges)(,){*cert. denied,* 510 U.S. 1071 (1994)}.

Id.

(To this list of cases, that court could just as well have added *Southern Christian Leadership Conference (SCLC) v. Sessions*, 56 F.3d 1281 (11th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1045 (1996)(suggestions to reconfigure judicial circuits to create black majorities or subdistrict circuits and counties were not feasible remedies.)[1]

The above narrative demonstrates that, despite petitioners' claim of conflict and that the decisions below are an anomaly, in fact Section 2 judicial election jurisprudence is consistent and uniform in rejecting the arguments petitioners assert here. In sum, petitioners' claims here argue for a departure from Section 2 jurisprudence as demonstrated by the cases noted above.

On the subject of cumulative voting, the *Cousin* court said:

(O)ur research has revealed only one federal case that has ordered cumulative voting in any electoral context, and that in a case where the plaintiffs challenged the selection of a county legislature, *Cane v. Worcester County, Maryland*, 847 F.Supp. 369 (D.Md. 1994), *aff'd in part and rev'd in part*, 35 F.3d 921, 928 (4th Cir. 1994) (reversing the district court's imposition of cumulative voting because the district court did not

[1] It is noted that this Court denied certiorari in four of these cases: *LULAC, Nipper, Milwaukee Branch of the N.A.A.C.P.*, and *Southern Christian Leadership Conference.*

> cumulative voting because the district court did not adequately "give effect to the legislative policy judgments underlying the current legislative scheme"). We find it significant that the Fourth Circuit reversed the district court's imposition of cumulative voting in *Cane*, leaving us with no example in federal case law in which cumulative voting has been ordered and approved for elections to any office. Neither are we aware of any jurisdiction that has elected state trial judges by means of cumulative voting.

Id.

The *Cousin* decision is further instructive in its handling of the *Gingles*' totality of the circumstances analysis because, just as is the case here, the Sixth Circuit found that only the effects of past discrimination--"the fifth 'typical' Senate factor"--weighed "clearly in favor of a finding of vote dilution" 145 F.3d at 834. The court concluded, however, that notwithstanding that finding, "the district court's application of the totality of the circumstances test was clearly erroneous. . .(pointing out that) this one factor, in combination with the others, does not outweigh the significant linkage interest Tennessee has in electing" trial judges. *Id.* The *Cousin* court therefore conducted a balancing test, weighing the degree of racial polarized voting with the strong State interest in maintaining its judicial structure, and concluded that the degree of evidence was not sufficient to overcome the State's interest.

Cousin therefore is virtually identical to the case *sub judice* in that the only totality factor supportive of petitioners' Section 2 claim below was not enough to allow either the district or circuit

court to overcome Florida's strong interest in preserving its judicial structure.

This required balancing of the degree of racially polarized voting and the State's interest in its existing judicial structure is more clearly shown in one of the cases cited in *Cousin* and presented to this Court for certiorari review, *Milwaukee Branch of the N.A.A.C.P., supra*. In that case, the court lays to rest petitioners' argument here--as well as the Eleventh Circuit's concern--that a State's interest in its judicial system operates as an absolute bar to remediating a Section 2 violation:

> *Houston Lawyers' Ass'n*, 501 U.S. at 427, 111 S.Ct. at 2381, tells us that "the State's interest in maintaining an at-large, district-wide electoral scheme for single-member [judicial] offices ... does not automatically, and in every case, outweigh proof of racial vote dilution." (The district court judge) did not treat this interest as "automatically" outweighing proof of vote dilution; he said no more than that the interest is weighty. In asking us to hold that this was error, plaintiffs really want us to say that the only proper weight is zero (or, if not nil, so low that it can never tip the balance). Such a conclusion would put us in conflict with en banc decisions of the fifth and eleventh circuits, which hold that this consideration is powerful, indeed **dispositive unless the plaintiffs show gross racial vote dilution**. *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 872 (5th Cir. 1993)(en banc) (*LULAC*); SCLC, 56 F.3d at 1294-

> 95; *Nipper*, 39 F.3d at 1543; accord, *Cousin v. McWherter*, 46 F.3d at 568, 577 (6th Cir. 1995). (Emphasis added.)

116 F.3d at 1200.

This language clearly rejects petitioners' view--and allays the Eleventh Circuit panel's concern--that a State's interest in its judicial structure automatically outweighs whatever evidence of racially polarized voting may be shown, and also demonstrates that *Houston Lawyers', LULAC* and *Nipper* are consistent with the decisions below. Section 2 judicial election jurisprudence clearly establishes that the degree of actionable racially polarized voting must be balanced and weighed against the State's strong interest in preserving its judicial structure. In the case at bar, petitioners simply did not meet the evidentiary burden necessary to pursue entitlement to the drastic relief they seek.

Therefore, contrary to petitioners' contention, there is no doubt that a Section 2 remedy exists in a judicial election setting, even as against the State's strong interest in maintaining an at-large, district-wide electoral system, but only if and when there is a showing of "gross racial vote dilution." This view is founded upon *Thornburg v. Gingles*, 478 U.S. at 56, which establishes that the existence of racial bloc voting must reach a certain level; that is, it must be "legally sufficient." This legal sufficiency is determined on a sliding scale, based on the district and a host of relevant particularized fact-based circumstances. *Id.*

Against this backdrop, the Eleventh Circuit in the case at bar in actuality correctly concluded that the evidence of vote dilution was not demonstrative of the required gross racial vote dilution necessary to overcome the State's weighty interest in its judicial structure. This evidentiary requirement of "gross racial vote dilution" shows that the Eleventh Circuit's concern, echoed by petitioners, that Section 2 "cannot be said to apply, in any meaningful way, to at-large judicial elections(,)" App 21a, is a misapprehension.

The facts set out in the Statement of the Case above reveal that petitioners' efforts here to impose on the State the proffered remedial scheme is based on the most tenuous of reasons for finding actionable vote dilution. In essence, the district court's factfinding, premised on a presumption of the effects of past discrimination based on a small percentage differential of black-white voter registration, and both the district court's and Eleventh Circuit's refusal to find gross racial vote dilution from the evidence presented by petitioners, demonstrate that the decisions below are correct and wholly consistent with post-*Houston Lawyers'* Section 2 jurisprudence.

The cases cited herein reveal that there may well be Section 2 judicial election cases in which racially polarized voting is so severe, pervasive and persistent as to justify casting aside a State's strong interest in its judicial system in favor of some type of remedy, perhaps even one from the several types of far-reaching, egregious constitutional and statutory alterations to a State's judiciary as petitioners proffer here by way of sub-districts, cumulative voting and limited voting. However, as the decision of the district court demonstrates, App. 29a-83a, 103a-140a, no such finding was, or could have been, made here.

The Eleventh Circuit left no doubt as to the profound and fundamental adverse impact of petitioners' proposed Section 2 remedies. The court, after noting that petitioners did not "contest any of these constitutional problems under Florida law," App. 11a, found the following flaws:

> First, Davis's plan would require changes to Article V, Section 10 of the Florida Constitution, which directs that circuit and county judges be elected "by a vote of the qualified electors within the territorial jurisdiction of their respective courts." Fla. Const. art. V § 10.Under Florida law, there is a difference between an"election," which allows for competing candidates, and a "retention" vote for judicial office, which does not. See Fla. Stat. § 105.011(2)(distinguishing between an "election" and a "retention" in defining a "judicial office"). Although Davis's plan would permit citizens residing outside a subdistrict to vote in retentions, it would deny them the right to take part in the "elections," in contravention of Florida's provision that they can participate in both. See Fla. Stat. § § 105.061, 105.051.
>
> Second, the retention language of Article V, Section 10 includes only justices of the Florida Supreme Court or judges of a district court of appeal, as do Florida's statutes. See Fla. Const. art. V § 10(a); Fla. Stat. § § 105.051(2), 105.061. Accordingly, there is no constitutional or statutory basis in Florida law for the retention system Davis

> proposes; as the district court observed, Florida's Constitution and statutes would have to change to allow for Davis's proposed move from jurisdiction-wide, competitive elections to competitive, subdistrict elections followed by jurisdiction-wide retentions.
>
> Third, Article V, Section 9 of the Florida Constitution provides that either the Supreme Court of Florida or the Florida legislature shall define the territories of Florida's judicial circuits. See Fla. Const. art. V § 9. If a court were to require Florida to accept one of the subdistrict design plans contained in Davis's subdistricting proposal, it would, by necessity, contravene this provision.

App. 11a-12a.

It is against this backdrop that the Eleventh Circuit considered the strength and profound weight that must be accorded Florida's judicial structure. As the court said:

> Territorial linkage between a trial judge's jurisdiction and electoral base serve Florida's interest in judicial accountability. See *SCLC*, 56 F.3d at 1296-97; *Nipper*, 39 F.3d at 1543-45 (plurality opinion). Were a judge to be answerable to an electorate smaller than his jurisdiction, the judge would have an incentive, however unethical, to engage in "home cooking," favoring litigants from his election district over others. See *SCLC*,

> 56 F.3d at 1297. Thus, as the Supreme Court has observed, "the State's interest in maintaining. . . the link between a district judge's jurisdiction and the area of residency of his or her voters. . . is a legitimate factor to be considered by courts among the 'totality of the circumstances' in determining whether a § 2 violation has occurred." *Houston Lawyers'*, 501 U.S. at 426, 111 S.Ct. at 2381. When, as in this case, there is no evidence that a state is administering its judicial election system in a racially discriminatory manner, the state's interest in preserving linkage between judges' jurisdiction and electoral bases is even weightier. See *Nipper*, 39 F.3d at 1544 (plurality opinion). Moreover, we have suggested that Florida has an interest in avoiding even the appearance that its judges may harbor "home cooking" biases. *See id.*

App. 15a.

From this, the Eleventh Circuit concluded that Florida's asserted interest is strong and that the "proposed remedy would substantially break Florida's linkage between its judges' jurisdictions and electoral bases(,)" adding that

> we agree with the district court that imposition of Davis's plan "would be akin to compelling the state to disenfranchise every voter residing in the two jurisdictions, but outside the subdistrict." *See id.* at 44. Second, precedent requires us to recognize the risk that judges under Davis's proposal would prove unaccountable to many

voters even within their subdistricts because of continued racial bloc voting:

> [I]n the judge's own subdistrict, voters would be disenfranchised: In white subdistricts the voting power of blacks would be diluted; in black subdistricts the voting power of whites would be diluted. The likely effects of the loss of minority influence would be more pronounced in this context of a lone decision maker, a trial judge, who would lack input from the colleagues elected by the rest of the citizenry of the jurisdiction.

App. 16a-17a.

To overcome the Eleventh Circuit's view of Florida's strong interest in its judicial structure, coupled with the profound adverse impact of petitioners' proposed remedies on that structure, the district and appeals courts would have had to find gross racially polarized voting of such a severe and pervasive nature as to justify setting aside the State's strong interest and imposing one of the petitioners' draconian remedies. That the Eleventh Circuit did not make such a finding--nor could it from the evidence

presented at the district court level--demonstrates the obvious: petitioners simply failed to meet their evidentiary burden.

Petitioner's argument contravenes and contradicts the consistent, unbroken jurisprudential chain manifested by the cases set out in this brief. These cases, and this Court's disposition of some of them, leave no room for doubt as to what is required to make out a Section 2 judicial election vote dilution claim. Petitioner is required to (1) present overwhelming evidence of gross racially polarized voting, and thereby (2) overcome the State's strong interest in maintaining its judicial structure, and (3) thereafter propose a truly remedial plan that specifically addresses the gross vote dilution, and does so in a manner that does not unduly and unreasonably trample upon a State's judicial model. Petitioners' case simply does not meet the requisite evidentiary standard so as to justify their pervasive structure-altering remedies as against the State's strong interest in preserving its judicial structure.

II. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOUSTON LAWYERS' ASSOCIATION v. ATTORNEY GENERAL OF TEXAS*, 501 U.S. 419 (1991) OR THE FIFTH CIRCUIT'S DECISION IN WHICH THIS COURT DENIED CERTIORARI.

The cases cited in Point I above from the Fifth, Sixth, Seventh and Eleventh Circuits demonstrate clarity and consistency as to what is required to prove a Section 2 judicial election vote dilution claim, and serve to refute petitioners' claim of decisional conflict with *Houston Lawyers' Association* and *LULAC, supra*. In fact, in their entire petition, petitioners fail to present one post-

Houston Lawyers' case that manifests decisional conflict with those discussed in Point I, or discuss one case decided since *Houston Lawyers'* in which a court has imposed any of their proposed remedies where the degree of evidence of racially polarized voting was at the same level petitioners presented below.

Petitioners' claim of decisional conflict with *Houston Lawyers'* and *LULAC* rings hollow in light of the fact that *Cousin v. Sunquist, supra*, discussed in Point I above---which petitioners intimate is in lockstep with the case *sub judice*, pet. pg. 22, fn. 11 ---draws its support and rationale from *Houston Lawyers'* and *LULAC*, as well as the other cases referenced in the Sixth Circuit's decision.

Since *Cousin* is predicated upon those cases petitioners rely on for conflict, and the case at bar is virtually identical to *Cousin* in those critical areas of degree of evidence, burden of proof and strength of judicial structure, it follows that this case also draws its support from the very cases on which petitioners rely for their conflict argument. Therefore, the case at bar cannot be in conflict with cases that ultimately support the rationale for the decisions below.

Of equal import is that neither *Houston Lawyers'* nor *LULAC* holds that a State's interest in preserving its judiciary always outweighs evidence of vote dilution. In fact, no case so holds, including the case at bar. Rather, these two seminal cases stand for the proposition, reiterated in the others noted above in Point I, that when a petitioner seeks one of the most profound acts that can be taken by a court, the jettisoning of an existing State judicial structure based on a federal statutory claim, the degree of evidence required--gross racial vote dilution--must be as

substantive, substantial and profound as to compel a court to conclude without reservation that the stark consequences of the remedy sought are justified as a matter of law.

In short, a Section 2 judicial election vote dilution case is made when a court weighs the evidence against the State's strong interest in preserving its judiciary, and finds that the evidence is so profound as to unalterably demonstrate the existence of gross vote dilution, which thereby justifies the upheaval in a State's judicial model born of a petitioner's proposed remedy, recognizing that that remedy must do no more than correct the gross vote dilution.

From this perspective, petitioners simply did not meet their evidentiary burden so as to justify imposing, as a remedy, a system under which, for example, a candidate for judicial office would not even be able to vote for himself or herself, nor would family members and neighborhood friends. App. 72a, fn. 39. Such a proffered system, which the courts below agreed would result in voter disenfranchisement, was properly weighed by the courts as against petitioners' vote dilution evidence, wherein the courts found only Senate Factor Five of *Gingles'* totality factors--the effects of past discrimination--as militating in favor of petitioners here, in reaching the conclusions set out in their decisions.

The evidentiary burden imposed on a petitioner in a section 2 judicial election case is indeed a heavy one; but litigation that calls for the type of profound constitutional and statutory re-write that petitioners seek here requires nothing less.

III. SECTION 2 JURISPRUDENCE PERTAINING TO JUDICIAL ELECTIONS DEMONSTRATES THAT THERE ARE NO UNRESOLVED ISSUES OF NATIONAL IMPORTANCE REGARDING THE APPROPRIATE STANDARDS FOR EVALUATING A SECTION 2 VOTE DILUTION CHALLENGE.

The uniformity and consistency of post-*Houston Lawyers'* and post-*Nipper* jurisprudence, in addition to vitiating any claim of decisional conflict, also demonstrate that there are no unresolved issues of national importance. The relative weight of the State's interest in maintaining its judiciary has been considered in several cases. (Specifically, Florida's strong interest in its judiciary has already been before this Court in *Nipper*.) That weight was and is a matter of profound consideration that was, and will continue to be, legitimately balanced against the degree of racially polarized voting, recognizing at all times that only a showing of gross racially polarized voting will allow a court to consider outweighing the State's asserted interest in its judiciary. Neither the circuit nor district court found gross racial vote polarization justifying the profound constitutional and statutory changes, and their concomitant consequences, born of petitioners' proffered remedies here. In short, the lower courts found that the remedies are not remedial at all; that the particularized facts of this case did not support a judicial re-write of several of the State's constitutional and statutory provisions governing its judiciary and the dire consequences flowing from it.

Stated succinctly, Section 2 judicial election jurisprudence now unmistakably requires that the degree of evidence of gross racially polarized voting must be at least as profound as the gravity and consequences of the remedy sought and imposed in order to establish a Voting Rights Act violation.

From the above, the is no reason for this Court to accept petitioners' invitation to visit this case, and in so doing, in effect revisit those cases discussed in Point I above. Petitioners' attempt to treat the Eleventh Circuit panel's decision as a jurisprudential anomaly fails in light of the above analysis of Section 2 judicial election cases. Petitioner can take comfort from current jurisprudence that there may well be cases justifying what they seek here. This case, however, is not one of them.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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STATE OF FLORIDA
DEPARTMENT OF STATE

Division of Elections

I, Sandra B. Mortham, Secretary of State,
do hereby certify that

Augustus Davis Aikens, Jr.

was duly appointed

Judge of the County Court,
Leon County, Group Four

for a term beginning on the

Sixth day of January, A.D., 1998,

until the First day of January, A.D., 2001

as shown by the records of this office.

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the Second day of October, A.D., 1998.

Sandra B. Mortham

Secretary of State

DSDE 99 (5-97)

Supreme Court, U.S.
FILED
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(3)

No. 98-512

In the Supreme Court of the United States

October Term, 1998

Anita Davis, *et al., Petitioners,*

v.

Lawton Chiles, *et al., Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

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Petitioners' Reply Brief in Support of Petition for Writ of Certiorari

The respondents agree with petitioners that it would be improper, and contrary to this Court's decision in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), for a court of appeals to hold that a State's interest in preserving its existing judicial election system always outweighs evidence of vote dilution. According to respondents, however, the Eleventh Circuit did not "so hold[] ... [in] the case at bar," Op. Cert. 17, but instead simply expressed a "concern" that it so held. Op. Cert. 9, 10, 11. To sustain this curious argument, the respondents defend for the most part, not the decision of the Eleventh Circuit, but a decision in another case by the Seventh Circuit, *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir 1997). According to the respondents, certiorari should be denied in the present case because the Seventh Circuit does not accord a State's interest dispositive weight as a matter of law, but instead would allow a State's interest to be overcome by evidence of "gross racial vote dilution." Op. Cert. 9-10, quoting *Milwaukee Branch*, 116 F.3d at 1200.

Of course, the petition here seeks review of a decision of the Eleventh Circuit, not the Seventh Circuit. And the Eleventh Circuit in this case said that the State's interest constitutes "an insurmountable weight" to plaintiffs challenging at-large judicial election districts, J.S. App. 21a. "In this Circuit," said the Court of Appeals in this case, "Section Two of the Voting Rights Act cannot be said to apply, in any meaningful way, to at-large judicial elections." *Id.* It is this conclusion that led the Eleventh Circuit to reject the petitioners' appeal even though the petitioners had, according to the Eleventh Circuit, "presented persuasive evidence of racially polarized voting

in elections for judgeships in the Second Circuit and Leon County Courts." J.S. App. 28a.

In ruling against the petitioners, the Eleventh Circuit never suggested that plaintiffs in judicial elections cases under Section 2 could overcome the State's interest with "substantial proof of racial dilution," *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 870 (5th Cir. 1993) ("*LULAC*"), or with a showing of "gross racial vote dilution," *Milwaukee Branch*, 116 F.3d at 1200. Instead, it held that the State's interest is an "insurmountable weight," J.S. App. 21a, such that no showing of dilution, however strong, can overcome that interest.

While the respondents argue that petitioners did not meet the Seventh Circuit's "gross racial vote dilution" standard, the Eleventh Circuit did not even mention that standard, much less hold that the petitioners failed to meet it.

Indeed, in contrast to the Seventh Circuit's conclusion in *Milwaukee Branch* that the evidence there "show[ed] not only substantial willingness among white voters to support black candidates, but also the ability of those candidates to gain and keep office," 116 F.3d at 1197, the Eleventh Circuit said here that "[n]otwithstanding this political cohesion among black voters, however, white voters did not supply enough crossover votes for the black candidates to prevail, but instead provided overwhelming support to the white candidates." J.S. App. 4a.

Because of its absolute approach regarding the State's interest, the Eleventh Circuit never weighed this evidence of dilution against the State's interest, and never considered any of it as part of the "totality of

circumstances" inquiry mandated by the language of Section 2.[1] While the respondents frame the first of their restated Questions Presented as "[w]hether the degree of evidence of racial bloc voting in this case ... outweigh[s] Florida's strong interest in maintaining its current system," that question was never addressed by the Eleventh Circuit. Properly stated, the question before this Court is whether the Eleventh Circuit was correct in declining even to consider and weigh the evidence of polarization and dilution.

By focusing on the Seventh Circuit decision in *Milwaukee Branch*, the respondents inadvertently highlight the level of conflict and confusion that exists in the Courts of Appeals over the application of Section 2 to judicial elections. While the Eleventh Circuit has said that the State's interest is an insurmountable weight, the Fifth and Seventh Circuits have held that the interest can be overcome, albeit only by a heightened showing of "substantial proof of racial vote dilution," *LULAC*, 999 F.2d at 868, or "gross racial vote dilution," *Milwaukee Branch*, 116 F.3d at 1200.

Whatever the word "gross" may mean in this context, and whether or not there is any basis in the language or structure of Section 2 to require a heightened showing in

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[1]The respondents make reference to the election and appointment of judges that occurred since the decision of the District Court, Op. Cert. at 2. When the respondents sought to include this post-trial evidence in the record on appeal, the Eleventh Circuit refused to grant their motion. *See*, Appellees' Request for Judicial Notice, filed 2 Jan 1997 and never ruled upon; and Appellees' Petition for Rehearing, filed May 1998, denied 26 June 1998. The refusal was proper because these facts had not been considered by the District Court and would require reopening the record to allow the petitioners to present evidence of the surrounding circumstances.

judicial elections cases, the conflict among the circuits is clear. This Court should grant certiorari to resolve it and to eliminate at least some of the confusion that has arisen in the wake of *Houston Lawyers'* over the proper application of Section 2 to judicial elections.

And, of course, certiorari should be granted because of the Eleventh Circuit's conflict with *Houston Lawyers'* itself. As noted earlier, the respondents agree with petitioners that it would be wrong, and would conflict with *Houston Lawyers'*, for the Eleventh Circuit to place insurmountable weight upon the State's interest. The decision below clearly states an "insurmountable weight" standard. Respondents' efforts to recharcterize the decision cannot remove or alter that standard.

Lastly (and certainly not least), since the "insurmountable weight" standard is inconsistent with this Court's holding in *Houston Lawyers'* that the State's "interest does not automatically, and in every case, outweigh proof of racial vote dilution," 501 U.S. at 427, the decision below conflicts with *Houston Lawyers'*.

The petition should be granted.

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No. 98-512

In the Supreme Court of the United States

OCTOBER TERM, 1998

ANITA DAVIS, LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, AND KIM T. LYLES, PETITIONERS

v.

JEB BUSH, GOVERNOR OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, consistent with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, a State's interest in maintaining its current system of at-large elections for trial court judges may preclude as a matter of law any remedy that would alter that judicial model, even if the existing model denies minority voters an equal opportunity to participate in the political process and elect candidates of their choice.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Chisom v. *Roemer*, 501 U.S. 380 (1991)	8
Cousin v. *McWherter*, 46 F.3d 568 (6th Cir. 1995)	17
Cousin v. *Sundquist*, 145 F.3d 818 (6th Cir. 1998), petition for cert. pending, No. 98-598	17
Holder v. *Hall*, 512 U.S. 874 (1994)	11, 12
Houston Lawyers' Ass'n v. *Attorney General*, 501 U.S. 419 (1991)	8, 9, 10, 17
League of United Latin Am. Citizens v. *Clements*, 999 F.2d 831 (5th Cir. 1993), cert. denied, 510 U.S. 1071 (1994)	16, 17
Milwaukee Branch of the NAACP v. *Thompson*, 116 F.3d 1194 (7th Cir. 1997), cert. denied, 118 S. Ct. 853 (1998)	17
Nipper v. *Smith*, 39 F.3d 1494 (11th Cir. 1994), cert. denied, 514 U.S. 1083 (1995)	4, 5, 6, 7, 11, 12, 14, 15, 17
Shaw v. *Reno*, 509 U.S. 630 (1993)	5
Southern Christian Leadership Conference v. *Sessions*, 56 F.3d 1281 (11th Cir. 1995), cert. denied, 516 U.S. 1045 (1996)	4
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	3, 4, 5, 11, 16
Upham v. *Seamon*, 456 U.S. 37 (1982)	13
Voinovich v. *Quilter*, 507 U.S. 146 (1993)	13
Whitcomb v. *Chavis*, 403 U.S. 124 (1971)	13

Constitution and statutes: Page

U.S. Const.:
Art. VI, Cl. 2 (Supremacy Clause) 13
Amend. XIV (Equal Protection Clause) 3, 6
Amend. XV 3
Fla. Const. Art. 5, § 11(b) 2
Voting Rights Act of 1965, § 2, 42 U.S.C. 1973 ..... 1, 3, 5, 9, 10, 11, 12, 16
42 U.S.C. 1983 3
Fla. Stat. Ann. § 34.01 (West 1998) 2

Miscellaneous:

S. Rep. No. 417, 97th Cong., 2d Sess. (1982) 13

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-512

ANITA DAVIS, LEE HARRIS, LAFAYE DENISE BIRCH, MALACHI ANDREWS, AND KIM T. LYLES, PETITIONERS

v.

JEB BUSH, GOVERNOR OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. This case arises out of a challenge under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, to Florida's system for electing judges to both tiers of the State's trial courts in the northern part of the State: the Second Judicial Circuit Court and the Leon County Court.

Florida's circuit courts have general jurisdiction over civil and criminal matters, while its county courts have limited jurisdiction over misdemeanor and small claims

cases specified by statute. See Fla. Stat. Ann. § 34.01 (West 1998). The Second Judicial Circuit Court encompasses six counties (including Leon County), and currently has 11 judges, elected in circuit-wide voting for six-year terms. Pet. App. 2a-4a & n.2, 104a-105a. The Leon County Court has four judges, elected in county-wide voting for four-year terms. *Id.* at 2a-3a, 104a-105a.

Judges are elected to both courts through at-large voting under a numbered-post system. Each candidate for a seat on either court must select and run for a particular numbered position on that court. A candidate must obtain a majority of the votes cast for that position in order to be elected. Pet. App. 3a & n.1, 105a.

When a vacancy occurs between elections, the Governor has the authority to fill the vacancy by choosing from a list of candidates prepared by a judicial nominating commission. Fla. Const. Art. 5, § 11(b); Pet. App. 3a. While the appointment process has played a significant role in the selection of judges for the Leon County Court, judges on the Second Judicial Circuit Court have primarily obtained their seats through election. *Id.* at 6a, 48a.

b. The evidence established that blacks constitute 26.1% of the voting age population in the Second Judicial Circuit, and 22.2% of the voting age population in Leon County. Pet. App. 2a- 3a, 104a-105a. Voting in both Second Judicial Circuit and Leon County elections is racially polarized. *Id.* at 3a, 33a. In judicial elections involving both black and white candidates, the overwhelming majority of black voters have supported black candidates, while the majority of white voters have supported white candidates. That has been true regardless of whether the black candidate was competing for an open seat or against a white incumbent.

Id. at 3a-4a, 49a. In addition, in 11 elections for positions on the two courts where all candidates were white and where black and white voters preferred different candidates, "black voters have never succeeded in electing their first choice candidate." *Id.* at 5a; accord, *id.* at 40a-41a.

At the time of the district court's initial finding of a Section 2 violation in 1992, no black person had ever been elected or appointed to any of the judicial positions on the Second Judicial Circuit Court or the Leon County Court. Pet. App. 123a.[1] Nor, since 1976, had any black person been elected to any other office in circuit-wide voting or county-wide voting in Leon County, although black candidates had run in numerous contests during that time. *Ibid.*

2. a. Petitioners are black citizens living in the Second Judicial Circuit and in Leon County. In 1990, they filed this class action suit under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, to challenge the legality of the judicial election systems in those jurisdictions. Pet. App. 6a, 103a-104a & n.1.[2]

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[1] After the district court's finding of a Section 2 violation, the State legislature created an additional seat on the Second Judicial Circuit, and the Governor appointed a black lawyer to that seat. See Pet. App. 3a-4a n.2, 6a n.6, 9a n.13. The court of appeals noted that such election or appointment of minority candidates during the pendency of Section 2 litigation is of little probative value. *Id.* at 3a-4a n.2, 6a n.6 (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 76 (1986)).

[2] Petitioners also brought a claim under 42 U.S.C. 1983, alleging that the judicial election systems violate their rights under the Fourteenth and Fifteenth Amendments. Pet. App. 104a. The district court rejected that claim, finding that the election systems were not established or maintained for a discriminatory purpose. *Id.* at 139a. Petitioners did not appeal that ruling and it is not before this Court.

On September 3, 1992, after a bench trial, the district court entered judgment for petitioners. Pet. App. 103a-148a. The court found that petitioners had established for both jurisdictions the three preconditions necessary, under *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), to establish vote dilution in a Section 2 challenge to at-large elections: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that the minority group voters are "politically cohesive," and (3) that "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." Pet. App. 108a-109a (quoting *Gingles*, 478 U.S. at 50-51); *id.* at 111a- 123a.

The court further concluded that, "under the totality of the circumstances, the current at-large system for electing Second Judicial Circuit and Leon County Court judges denies black voters an equal opportunity to participate in the political process and to elect candidates of their choice, in violation of Section 2." Pet. App. 139a. The court directed the parties to file submissions concerning an appropriate remedy. *Id.* at 9a, 140a.

b. Shortly after its ruling in favor of petitioners on liability, the court "stayed further proceedings during the 1993 session of the Florida legislature in order to allow the state to develop a remedy." Pet. App. 9a. Subsequently, the court extended the stay pending the Eleventh Circuit's en banc decision in *Nipper* v. *Smith*, 39 F.3d 1494 (1994), cert. denied, 514 U.S. 1083 (1995). Pet. App. 9a. After the Eleventh Circuit issued that decision and its decision in *Southern Christian Leadership Conference* v. *Sessions*, 56 F.3d 1281 (1995) (en banc), cert. denied, 516 U.S. 1045 (1996), the district court reconvened the proceedings to address the

question of remedy and ultimately set the case for retrial on the Section 2 issue. Pet. App. 9a, 29a-30a & n.2.

On July 21, 1996, the district court entered judgment for respondents. Pet. App. 29a-102a. The court emphasized that new evidence at the retrial did not contradict the court's "previous finding of widespread racially polarized voting within Florida's Second Judicial Circuit and Leon County, Florida." *Id.* at 33a. The court also found that "incumbency does not explain the racially polarized voting patterns found here." *Id.* at 49a. Thus, the court again ruled that petitioners had established the second and third *Gingles* preconditions of political cohesion of minority voters and bloc voting of the white majority. *Id.* at 50a.

With regard to the first *Gingles* factor, however, the court reversed its earlier ruling. The court ruled that, under *Nipper*, petitioners could not meet their prima facie burden in a Section 2 vote-dilution case unless they presented, as part of the first *Gingles* factor, a remedy "within the confines of the state's judicial model." Pet. App. 50a (citing *Nipper*, 39 F.3d at 1530-1531). The court rejected all of the remedies proposed by petitioners—which included several different proposals for subdistricting, and several other proposals for cumulative or limited voting within the existing at-large districts—as not being within Florida's "judicial model," and concluded that petitioners had not met their burden of showing a permissible remedy under the *Nipper* standard. *Id.* at 68a-80a.[3]

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[3] The court also found that petitioners' proposed plans were unconstitutional under *Shaw* v. *Reno*, 509 U.S. 630 (1993), and its progeny, because they were drawn for predominately race-based reasons and could not survive strict scrutiny. Pet. App. 62a-67a.

In particular, the court ruled that the proposed subdistricting would break the linkage otherwise provided by Florida law between the territorial jurisdiction of the judges on the two courts and their electoral bases, Pet. App. 74a-77a, and that this flaw could not be cured by a proposed circuit-wide or county-wide approval vote or retention vote because such a vote would require changes in Florida law. The court rejected the proposed at-large voting plans because cumulative and limited voting would also require changes in Florida law, in violation of *Nipper*'s requirement of a remedy that can exist within the confines of the State's judicial model. See *id.* at 51a-62a, 68a- 82a.

3. The court of appeals affirmed. Pet. App. 1a-28a.[4] The court of appeals agreed with the district court's finding that racially polarized voting plagued the electoral systems at issue. The court of appeals noted that as a result "black candidates [have] little hope of achieving judicial office," *id.* at 18a, and "black voters lack the ability to play even a 'swing' role within the two election districts, whatever the race of the candidates." *Id.* at 5a. The court noted that "black candidates' lack of electoral success is not simply the result of incumbency," *id.* at 4a n.4, and that "black voters cannot rely on the appointment process to offset the effects of racially polarized voting," *id.* at 5a-6a. The court cited the district court's finding that "there is more evidence to support a finding of racially polarized

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[4] The court rejected the district court's holding that petitioners' proposed subdistricts would constitute racial gerrymandering in violation of the Equal Protection Clause, Pet. App. 22a-28a, with one judge declining to join the relevant portion of the opinion. *Id.* at 28a (Fay, J., concurring specially).

voting in this case than there was in *Gingles*." *Id.* at 8a n.12.

Nonetheless, the court rejected petitioners' Section 2 claim on the ground that the Eleventh Circuit's Section 2 precedents "foreclose any significant restructuring of a state's judicial election system." Pet. App. 2a. The court reiterated its holding in *Nipper* that a Section 2 plaintiff must demonstrate the existence of a remedy within the confines of the State's judicial model, as part of his or her prima facie case, and held that petitioners had failed to do so, because each of their proposed remedies required extensive changes to the judicial model set forth in Florida law. *Id.* at 10a-22a.

The court concluded that it was compelled by circuit precedent to hold that the State's interest "in maintaining its judicial model and in preserving such linkage" outweighs petitioners' interest in "ameliorating the effects of racial polarization in at-large judicial elections." Pet. App. 20a.[5] The court emphasized, however, that it was "troubled by the apparent presumption in favor of status-quo polarization" under Eleventh Circuit precedent, *id.* at 14a, which "foreclose[s] any significant restructuring of a state's judicial election system," *id.* at 2a. The court further explained that it was "troubled by the analysis and the conclusion that [the Eleventh Circuit's] precedents appear to require in cases such as the one at bar." *Id.* at 20a. The court declared that, in interpreting the Supreme Court's

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[5] The court summarily rejected petitioners' proffered plans for cumulative or limited voting within the at-large districts because the Eleventh Circuit had already rejected those remedies in *Nipper* based on the fact that they would require the elimination of Florida's numbered-post system for judicial elections and force incumbent judges to run against each other. Pet. App. 6a-7a n.7.

decisions that held that Section 2 applies to state judicial elections—*Houston Lawyers' Ass'n* v. *Attorney General*, 501 U.S. 419 (1991) and *Chisom* v. *Roemer*, 501 U.S. 380 (1991) — the Eleventh Circuit

> has placed what now seems, in hindsight, to be an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdictions and electoral bases. Together with *Nipper*, *SCLC*, and the additional case of *White* v. *Alabama*, we will with this decision have disallowed redistricting, subdistricting, modified subdistricting, cumulative voting, limited voting, special nomination, and any conceivable variant thereof as remedies for racially polarized voting in at-large judicial elections.

Pet. App. 21a. The court was therefore unable "to envision any remedy that a court might adopt in a Section Two vote dilution challenge to a multi-member judicial election district," and concluded that, therefore, in the Eleventh Circuit, "Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections." *Ibid.* The court explicitly noted that this "doctrinal development appears to conflict with the Supreme Court's initial pronouncements on this subject in *Chisom* and *Houston Lawyers*," but nonetheless felt bound to adhere to circuit precedent. *Ibid.*

The court of appeals denied respondents' petition for rehearing and suggestion of rehearing en banc. Pet. App. 149a-150a; see Pet. 11 n.5.

DISCUSSION

The petition for a writ of certiorari should be granted. The court of appeals has held that a plaintiff alleging that an at-large judicial election system results in unlawful vote dilution under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, must establish, as part of a prima facie case, the availability of a permissible remedy that does not require any significant alteration to the State's current judicial election system. That ruling renders Section 2 inapplicable "in any meaningful way, to at-large judicial elections" in the Eleventh Circuit, Pet. App. 21a, and cannot be squared with the Court's holding in *Houston Lawyers' Ass'n* v. *Attorney General*, 501 U.S. 419, 427 (1991), that Section 2 applies to such elections.

The court of appeals' ruling also appears to conflict with decisions of the Fifth, Sixth, and Seventh Circuits. Each of those courts has held that a State's interest in maintaining a link between the territorial jurisdiction and the electoral base of a judge is a legitimate interest entitled to be weighed, but cannot always defeat a Section 2 vote dilution challenge. The Eleventh Circuit, by contrast, has effectively held that the State's interest "in maintaining its judicial model" will always outweigh an interest, however strong, in "ameliorating the effects of racial polarization in at-large judicial elections," Pet. App. 20a.

This Court should grant certiorari to establish that Section 2 can provide a remedy for vote dilution in an at-large system of electing judges even where the remedy might require some structural change in the at-large election system.

1. a. As the court of appeals acknowledged (Pet. App. 21a), it has essentially foreclosed any finding of a

Section 2 violation in a case involving at-large judicial elections, by effectively holding that a State's interest in maintaining its current judicial model always outweighs any evidence, however strong, that the judicial model results in minority vote dilution.

That ruling is inconsistent with this Court's holding in *Houston Lawyers' Ass'n* v. *Attorney General*, *supra*. In that case, the Court ruled that the results test of Section 2 applies to claims of vote dilution in elections of trial judges. 501 U.S. at 425-426. The Court held that a State's interest in maintaining a "link between a district judge's jurisdiction and the area of residency of his or her voters" is a legitimate factor for courts to consider in determining the viability of a Section 2 claim, but that it "does not automatically, and in every case, outweigh proof of racial vote dilution." *Id.* at 426-427. In particular, a State's interest cannot place an at-large judicial election system beyond Section 2 coverage, if the "impairment of a minority group's voting strength could be remedied without significantly impairing the State's interest in electing judges on a district-wide basis." *Id.* at 428.

Contrary to the Court's holding in *Houston Lawyers' Ass'n*, the Eleventh Circuit has effectively created an automatic exemption from the coverage of Section 2 for dilutive at-large judicial election systems. In this case, both courts below agreed that there was highly persuasive evidence of severe racial polarization and minority vote dilution. In fact, they recognized that "there is more evidence to support a finding of racially polarized voting in this case than there was in [*Thornburg* v.] *Gingles*," 478 U.S. 30 (1986). Pet. App. 8a n.12.

The court of appeals, however, ruled that petitioners failed to prove a Section 2 violation because any conceivable remedy for that vote dilution would alter

the State's "judicial model," citing *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). Pet. App. 11a-22a. The court explained that in its view *Gingles* requires a plaintiff raising a Section 2 challenge to an at-large judicial election system to demonstrate the existence of a remedy "within the confines of the state's judicial model." *Id.* at 13a-14a (quoting *Nipper*, 39 F.3d at 1531). The court of appeals also relied on *Holder* v. *Hall*, 512 U.S. 874, 880 (1994), to support its view that any Section 2 remedy cannot alter the State's judicial election model. Pet. App. 14a; see *Nipper*, 39 F.3d at 1531-1533.

The Eleventh Circuit has misconstrued both *Gingles* and *Holder*. There is no support for the Eleventh Circuit's view (see *Nipper*, 39 F.3d at 1531) that "[i]mplicit" in the first *Gingles* factor is a requirement that Section 2 plaintiffs establish the existence of a remedy within the State's current judicial model. *Gingles* set forth three factors to assist a court in determining whether a challenged multi-member district itself, and not some other circumstance, is responsible for denying minority voters full participation in the political process. *Gingles*, 478 U.S. at 48-51 & n.17; see p. 4, *supra*. The first *Gingles* factor—that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50,—like the other factors, tends to show such causation by showing that, absent the challenged practice or structure, the minority group would have been able to elect representatives of its own choice. In *Gingles*, the Court did not suggest that the remedy must be found within the State's existing electoral model.

Nor did the Court so suggest in *Holder*. The Eleventh Circuit mistakenly views *Holder* as establishing that the failure to identify "a workable remedy within the confines of the state's system of government" is fatal to a Section 2 vote-dilution challenge to at-large judicial elections (see *Nipper*, 39 F.3d at 1533). *Holder* merely held that a Section 2 vote-dilution challenge to the size of a single-member county commission must fail in the absence of any principled reason for selecting one alternative benchmark—or proposed remedy—over another. 512 U.S. at 881-882 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J.). The Court noted, however, that "[i]n certain cases, the benchmark for comparison in a § 2 dilution suit is obvious," *id.* at 880, and Justice O'Connor specifically cited, as an example of a case with a self-evident benchmark, "a challenge to a multimember at-large system," where "a court may compare it to a system of multiple single-member districts," *id.* at 888 (O'Connor, J., concurring) (citing *Gingles*, 478 U.S. at 38, 50); see also *ibid.* (O'Connor, J., concurring) ("a court may assess the dilutive effect of majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single- shot rules by comparing the election results under a system with the challenged practice to the results under a system without the challenged practice"). Thus, in *Holder*, the Court did not suggest that a remedy must be found within the confines of the existing electoral model. Rather, the plurality ruled only that, because of the absence of an obvious alternative benchmark in the particular circumstances of that case, it could not conclude that the challenged system was responsible for vote dilution.

The Eleventh Circuit's interpretation of *Gingles* and *Holder* misconceives the appropriate role of the State's

interest under Section 2. It has long been the rule that, where unlawful vote dilution exists, some alteration in the State's election system is necessary to remedy the violation. See S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982) ("The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."). To be sure, the remedy must not "intrude upon state policy any more than necessary." *Whitcomb* v. *Chavis*, 403 U.S. 124, 160 (1971). The Court has indicated that a State should be given the first opportunity to propose a remedial plan to take into account its interests that are not inconsistent with remedying the unlawful vote dilution, and that a court's modifications to such a plan should be "limited to those necessary to cure any constitutional or statutory defect." *Upham* v. *Seamon*, 456 U.S. 37, 43 (1982) (per curiam). But the fact that an adequate remedy may require some alteration of the State's current system does not foreclose relief as a matter of law. See *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993) (where state Constitution is in conflict with Voting Rights Act of 1965, Supremacy Clause, U.S. Const. Art. VI, Cl. 2, requires giving preference to federal law).

b. The Eleventh Circuit's erroneous categorical approach led it to conclude that the State's interest in maintaining its judicial model outweighs the interest in remedying vote dilution, and to reach that conclusion on the basis of circuit precedent, without considering whether the strength of the evidence of vote dilution in this particular case might call for a different result.

After determining that the State had an interest in maintaining a link between the territorial jurisdiction

and electoral base of its trial judges, the Eleventh Circuit noted that petitioners' subdistricting proposal attempted to preserve that interest by subjecting judges nominated from subdistricts to approval or retention in circuit-wide or county-wide elections. Pet. App. 16a-17a. The court nonetheless concluded that petitioners' proposal "would substantially vitiate Florida's linkage interest," *id.* at 17a, and ultimately ruled that petitioners' claim must fail based on the fact that the court, in previous cases, had held that "a state's interest in maintaining its judicial model and in preserving such linkage outweighed plaintiffs' interest in ameliorating the effects of racial polarization in at-large judicial elections." *Id.* at 20a. The court failed to take into account that Florida often subordinates its interest in linkage to other considerations, such as administrative convenience. *Id.* at 75a-76a; see also *Nipper*, 39 F.3d at 1558 (Hatchett, J., dissenting).[6] The court did not consider petitioners' evidence that other States have successfully implemented election of trial judges from subdistricts as a remedy for racially polarized voting, and have not suffered the adverse effects on the administration of justice augured by the Eleventh Circuit. Pet. 7; see also *Nipper*, 39 F.3d at 1558 (Hatchett, J., dissenting) (describing use of subdistricts in other States, including Mississippi, Louisiana, and New York).

The court also summarily rejected, based on circuit precedent and without any case-specific analysis, the use of cumulative or limited voting on a jurisdiction-

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[6] Indeed, as Judge Hatchett noted, "[e]ven when sitting in their own districts, judges must frequently decide cases involving litigants from different districts," and presumably are capable of doing so impartially. *Nipper*, 39 F.3d at 1558 (dissenting).

wide basis.[7] Both those proposals would preserve the State's asserted interest in maintaining linkage between electoral and jurisdictional boundaries, while giving minority voters some opportunity to elect candidates of their choice. Petitioners presented substantial evidence in support of those alternatives, and the State did not offer any evidence to demonstrate the strength of its interests in either the at-large or numbered-post elements of its judicial model. Nevertheless, the court held, solely on the basis of *Nipper*, that both remedies were categorically impermissible because they would require alteration of Florida's numbered-post system for judicial elections. Pet. App. 6a n.7. Specifically, the court noted Chief Judge Tjoflat's assumption in *Nipper* that elimination of the numbered-post system would destroy trial judges' collegiality in administrative matters, because it would require incumbent judges to run against each other. *Ibid.* See *Nipper*, 39 F.3d at 1546 (opinion of Tjoflat, C.J., joined by Anderson, J.); cf. *id.* at 1559 (Hatchett, J., dissenting) (noting that such speculative and "trivial concerns are not the core state policy that the Supreme Court envisioned to defeat a vote dilution claim").

The record is devoid of evidence regarding the State's interest in maintaining the collegiality of its

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[7] Under a cumulative voting system, each voter may cast as many votes as there are seats to be filled, but may, if he or she chooses, allocate more than one of those votes to a single candidate. Pet. App. 59a. Under a limited voting system, the total number of votes each voter may cast is less than the number of available seats, and a voter may only cast one vote per candidate. *Id.* at 60a. Either system may be used in a multi-member jurisdiction to make it more difficult for majority bloc voting to defeat a candidate supported by minority voters. Both systems require candidates to run against each other for all available seats.

trial judges in administrative matters, or the potential effect on that interest of modifying the numbered-post system. Nor did the court present any reason why this asserted state interest would be sufficient to outweigh the existing record showing that minority votes are significantly diluted and that minority voters are unable to affect judicial elections. Nothing in the factual record in this case establishes that a State's numbered-post system should be immune to challenge in the face of a denial of equal voting opportunity to minority voters. Cf. *Gingles*, 478 U.S. at 38-39 & n.6 (noting that use of numbered-seat scheme in a multi-member district can discriminate against minority voters).

2. The court of appeals' ruling appears to conflict with decisions in the Fifth, Sixth, and Seventh Circuits. Each has held, contrary to the Eleventh Circuit, that a State's interest in linkage, and in its existing judicial election system, are entitled to be weighed, on a fact-specific basis, but not to preclusive effect, in a Section 2 challenge to at-large judicial elections.

In *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831, 868 (1993) (en banc) (*LULAC*), cert. denied, 510 U.S. 1071 (1994), the Fifth Circuit held that Texas's interest in maintaining a linkage between the jurisdictional and electoral bases of its district courts was a legitimate interest that must be weighed in the totality of the circumstances to determine whether a Section 2 violation existed. The court expressly rejected "the polar extremes of the parties" who urged, on the State's part, "that the linkage interest must defeat liability in *every* case, regardless of the other circumstances in the totality," and on the plaintiffs' part, "that the linkage interest can never defeat liability under the totality of circumstances if 'illegal' dilution is otherwise established." *Id.* at 870.

The court found that Texas's interest in linkage was substantial, but ruled that "it will not always defeat § 2 liability" and that substantial evidence of minority vote dilution would defeat it. *Id.* at 876. In *Milwaukee Branch of the NAACP* v. *Thompson*, 116 F.3d 1194 (1997), cert. denied, 118 S. Ct. 853 (1998), the Seventh Circuit recognized that, under *Houston Lawyers' Ass'n*, a State's interest in maintaining linkage between the boundaries of a state judge's jurisdiction and his electoral base does not automatically outweigh proof of racial vote dilution, *id.* at 1200; it read *LULAC* and *Nipper* as holding that such an interest would, however, be "dispositive unless the plaintiffs show gross racial vote dilution." *Ibid.* In *Cousin* v. *McWherter*, 46 F.3d 568 (1995), the Sixth Circuit held that Tennessee had a substantial interest in preserving linkage between the judiciary's electorate and jurisdiction, but recognized that it could be outweighed by evidence supporting the dilution claim. *Id.* at 575-577.

In each of these cases, the court ultimately rejected the Section 2 vote-dilution claims based on its assessment of the plaintiffs' evidence, not on any holding that the State's interest in its current judicial model had preclusive effect as a matter of law. See *LULAC*, 999 F.2d at 837, 877-893; *Thompson*, 116 F.3d at 1197-1201; *Cousin* v. *Sundquist*, 145 F.3d 818, 821-826 (6th Cir. 1998) (opinion after remand), petition for cert. pending, No. 98-598.

Unlike the Fifth, Sixth, and Seventh Circuits, the Eleventh Circuit has effectively recognized a state interest in its existing judicial election system sufficient to preclude liability altogether, in the face of overwhelming evidence of vote dilution. Under *Houston Lawyers' Ass'n*, however, once vote dilution is found, an appropriate remedy should be crafted. No particular

remedy is required, and the State should be given the first opportunity to propose an adequate remedy, but the Voting Rights Act of 1965 does not permit automatic deference in such a case to all aspects of a State's "judicial model."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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